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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

NEW YORK CITY TRANSIT AUTHORITY,

Petitioner,

against

BERNARD McCUMMINGS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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(5091—LC10-149—1993)

QUESTIONS PRESENTED

1. In *Tennessee v. Garner*, 471 U.S. 1 (1985) this Court held that a police officer who shot and killed an unarmed teenager, fleeing after he had been caught burglarizing an empty home, had violated the decedent's Fourth Amendment rights. Shooting the fleeing teenager was a "seizure", the Court held, and an unreasonable one, considering that the teenager was unarmed, and was suspected of committing a mere property offense.

In our case, petitioner's police officer had probable cause to believe that respondent Bernard McCummings, though unarmed, had participated in robbing and strangling a frail, 72-year old subway passenger. When the 23-year old McCunmings started to run away, the officer shot him, solely to prevent his escape. McCummings sued petitioner, and recovered a $4.3 million judgment, which was affirmed by the New York Court of Appeals. The question presented by this case is the following:

Does the Fourth Amendment, as elucidated by *Garner*, condemn as unreasonable a police officer who uses deadly force to capture a fleeing felon, who though unarmed, had committed a felony involving serious physical violence? Or does *Garner* merely condemn as Constitutionally offensive the shooting of a felon who at most had committed a property offense so that, here, petitioner's police officer who shot a felon fleeing from a crime of violence, did not violate the Constitution?

2. Did the New York Court of Appeals deprive petitioner of its property without due process of law when it affirmed the judgment against it on a ground—common law negligence—that was never raised by any of the parties in the proceedings below, whether at trial or appeal, a ground transparently designed to defeat this Court's jurisdiction, and where petitioner would have

asserted different defenses had it known that it stood exposed to liability on a theory of negligence?

Parties

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case.

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I. *Garner* and *McCummings* leave unresolved the recurring question facing law enforcement personnel in every jurisdiction of the United States: Whether the United States Constitution allows police officers to use deadly force solely to capture a violent, unarmed fleeing felon. Moreover, the answer to that question has divided both the Circuit Courts and the legislatures of the various states . 16

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993.

NEW YORK CITY TRANSIT AUTHORITY,

Petitioner,

against

BERNARD MCCUMMINGS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Appeals of New York is officially reported as *Bernard McCummings v. New York City Transit Authority*, 81 N.Y.2d 923 (1993), and appears in Appendix "A" hereto at p.1a. The opinion of the Supreme Court, Appellate Division, First Department is officially reported as *Bernard McCummings v. New York City Transit Authority*, 177 A.D.2d 24 (1st Dept. 1992), and appears in Appendix "B" hereto at p.17a.

Jurisdiction

The order of the New York State Court of Appeals was entered on April 5, 1993 and appears in Appendix "C" at p.59a.

The petitioner by motion served April 30, 1993 and returnable May 17, 1993 moved for rehearing and reargument of the Court of Appeals decision. The Court of Appeals denied the motion on July 8, 1993, a denial not officially reported. The order of denial appears on p.61a of Appendix "D".

In accordance with Rule 13.4 of this Court, this Petition is filed within 90 days of denial by the Court of Appeals of petitioner's application for rehearing.

The Court has jurisdiction to hear Point I of this case under the provisions of 28 U.S.C. 1257(3) because a title, right, privilege or immunity is set up under the Constitution or statutes of the United States, specifically, the reach and limits of the Fourth Amendment's "reasonable seizure" requirement and the Fourteenth Amendment's due process clause. To the extent the judgment rests on the jury's determination that New York Penal Law §35.30 is inconsistent with *Tennessee v. Garner*, 471 U.S. 1 (1985), the Court has jurisdiction because the validity of a state statute was drawn into question because of its being repugnant to the Constitution of the United States.

The Court has jurisdiction to hear Point II under 28 USC 1257(3) because a title, right or privilege is set up under the "due process" clause of the Fourteenth Amendment.

Constitutional and Statutory Provisions Involved

A. Constitutional provisions

The Fourteenth Amendment to the United States Constitution provides in part:

> . . . [No state] shall deprive any person of life, liberty or property, without due process of law.

The Fourth Amendment to the United States Constitution provides in part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . .

B. Statutory provisions

42 U.S.C. §1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

New York Penal Law §35.30 provides in part:

> 1. A police officer . . . may use deadly physical force [to capture a fleeing felon] . . . only when he reasonably believes that:
>
> (a) The offense committed by such person was:
>
> (i) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person;

Statement of the Case

A middle-aged transit police officer, Manuel Rodriguez, on plain clothes patrol, hears strangled cries for help coming from a New York subway station. With his partner behind him, he runs down a stairway and encounters a familiar urban scene: two men in their twenties robbing and strangling a frail, old man. The two young men begin to flee, dash down another stairway and open up a formidable lead on the pursuing officers. Officer Rodriguez shouts "Halt, police," to no avail.

To prevent the muggers from escaping, Rodriguez fires five shots; two strike respondent Bernard McCummings, one severing his spine. Another strikes McCummings' accomplice, Jacob Wise in the arm. McCummings, paralyzed, collapses at the bottom of the stairway and is captured. His accomplice, Wise, manages to run out of the station and is caught later in the night at a hospital where he had sought treatment for his wounds.

McCummings, eventually convicted of felonious robbery, sued petitioner New York City Transit Authority pursuant to 42 U.S.C. §1983, charging that the police officer who shot him had used Constitutionally excessive force. Respondent McCummings argued that the Fourth Amendment as elucidated in *Tennessee v. Garner,* 471 U.S. 1 (1985) barred a police officer from using deadly physical force for the sole purpose of capturing a fleeing felon, no matter how violent or heinous the felony from whose commission the criminal was fleeing.

Petitioner countered by disputing respondent's interpretation of *Garner.* According to *Garner's* express language, a police officer could fire. . . .

> . . . if . . . [he or she had] probable cause to believe that [the fleeing felon] had committed a crime involving the infliction or threatened infliction of serious physical

> harm, . . . and if, where feasible, some warning ha[d] been given.
>
> 471 U.S. at 11-12

Thus, under *Garner*, argued petitioner, Officer Rodriguez was justified in firing his gun rather than allow McCummings to escape.

A civil jury in New York, rejecting the Authority's argument, awarded McCummings $4.3 million in damages (App. "E", 62a). The New York Court of Appeals with two judges dissenting affirmed the judgment (1a, 59a) necessarily adopting respondent's extreme understanding of *Garner:* that the Fourth Amendment barred police officers from firing their guns to capture an unarmed fleeing felon—even presumably a suspected mass murderer—and that police officers could never fire their weapons except to defend themselves or others.

The Court of Appeals' majority distorts *Garner's* meaning. It is not unconstitutional for a police officer to shoot a fleeing felon, even an unarmed one, where he or she has reason to believe that the felon had committed a crime of serious violence. A police officer, for example, who spots an unarmed mass murderer who ignores a warning to stop may fire a weapon, contrary to the Court of Appeals' implication, rather than allow the murderer to escape.

The question of what limits if any, *Garner* places on police attempts to capture a fleeing felon should be addresed by this court. Despite its explicit holding, *Garner's* language is elastic enough to support the extreme conclusions the Court of Appeals accepted here.

Moreover, different Circuit Courts have clashed over the meaning of *Garner.* Some appear to have adopted the extreme view endorsed by the *McCummings* court. *See Griffin v. Hilke,* 804 F.2d 1052, 1056 (8th Cir. 1986). Others, the majority, have endorsed the view argued for by petitioner. *See e.g. Ryder v. City of Topeka,* 814 F.2d 1412, 1419 (10th Cir. 1987).

Numerous states which, after *Garner,* had to modify their "justification" statutes have also disagreed about when *Garner* allows a police officer to use deadly physical force to capture a fleeing felon.

The *McCummings* case provides the perfect vehicle for the Supreme Court to clarify *Garner's* reach. It presents in pristine form the factual paradigm which have troubled the Circuit Courts and state legislatures since *Garner:* a police officer stumbles upon an unarmed criminal committing a violent felony, warns the felon to halt, and then fires a gun to prevent his escape.

If the Constitution bars a police officer from shooting an unarmed fleeing felon, even if the felon was suspected of attempted murder, this Court should say so and say so explicitly.

How the federal question was presented

Respondent can be expected to argue that the *McCummings* decision rested on purely state court grounds. The Court of Appeals majority, he will contend, wrote that the case was submitted to the jury on a theory of common law negligence (2a).

The majority's statement is untrue, and grotesquely so. As demonstrated at length (*see* Petition, *Infra*, pp. 10-13), the sole issue before the jury and *on appeal* was whether under *Garner* Officer Rodriguez was justified in using deadly force to prevent McCummings' escape. This court has often noted that it will not be bound by a state court's declaration that it disposed of a suit on an "adequate" state grounds where the record demonstrates otherwise. The record in this case is conclusive.

There are other important grounds for granting the writ. By affirming a judgment based upon a theory of liability never before the trier of facts or any appellate court, i.e., "common law negligence", the Court of Appeals deprived the Authority of its property without due process of law. Had the Authority been put on notice that it could be held liable in negligence, it would have raised the standard New York defenses, such as comparative negligence and assumption of risk, which would have reduced or barred any recovery for respondent.

As demonstrated below, the manner in which the Court below decided *McCummings* is not an isolated case. Rather, it is a direct outgrowth of the New York Court's aggressive exercise of "new federalism" under which the New York Court disposes of constitutional questions by relying on nominally independent and adequate state-law grounds. So determined has the Court of Appeals become to have the last word on constitutional law that at least

once before it relied on state grounds in a transparent effort to defeat this Court's jurisdiction, even though none of the parties had raised state grounds on appeal (*See Patchogue-Medford v. Board of Education*, 70 N.Y.2d 57, 71 [1987]).

Thus, the manner in which the *McCummings* majority decided this suit raises important due process concerns, but it also raises much more. A state court has disposed of a lawsuit raising important Constitutional issues by relying on transparently untenable state-law grounds solely to deprive this Court of the power to review its decision. The additional question the *McCummings* case raises is whether this Court will surrender its role as the supreme Constitutional decision-maker to a state court bent on usurping it, even at the expense of petitioner's due process rights.

Statement of Facts

Sandusky, the victim, enters the 96th Street station

On June 28, 1984 at 8:00 P.M. (317)[1], Jerome A. Sandusky, then 72-years of age (317), entered the New York City Transit Authority's 96th Street subway station on his way to a dinner engagement (317-19, 1995). After paying his fare, he went down the first of two stairways that would take him to the downtown trains (318). First he had to walk down stairway PL-5 until he reached a small landing (318). From there Sandusky would turn right and walk down another stairway, PL-6, which would take him to the downtown platform (318).

As Sandusky walked down PL-5, he noticed someone lounging at the top of the stairway, but made nothing of it (318, 1995). He soon reached the bottom of PL-5, entered the landing, and began to turn, on his way to go down PL-6 (318). As he was turning, Sandusky noticed two men waiting on the landing. The two, Sandusky suspected, were up to no good (318, 1995), an assumption that was quickly borne out by their actions.

McCummings and his accomplices

The two men waiting for him on the landing were Bernard McCummings and Jacob Wise. As Wise later confessed (2040), he, and McCummings and a girlfriend met earlier in the day when

[1]Page references in this section, unless otherwise indicated, are to the Appendix submitted to the New York Court of Appeals.

McCummings, short of cash, suggested that they find, mug and rob a "vic" (896-97; 2039, 2040). Wise and McCummings eventually entered the 96th Street station with one Nathan Woods, who agreed to serve as a lookout (896-97). McCummings and Wise stationed themselves at the PL-5/PL-6 landing, waiting for a victim (2039-40). The elderly Mr. Sandusky soon appeared.

Wise and McCummings promptly went for him, carrying out an agreed upon division of labor. Wise began pummelling and choking Sandusky while McCummings pinned him to the ground and went through his pockets (897). Sandusky, terrified and fearing for his life (*see* 320-21, *cf.* 436, 1517, 1519), screamed for help. Wise responded by choking Sandusky even harder and threatening to kill him (319, 1995, 2040).

The police officers

Wise and McCummings might very well have killed Sandusky (*see* 436) had not two Transit Authority police officers arrived at the scene. Officers Christine Mead and Manuel Rodriguez had been patrolling the 96th Street station, the scene of many earlier muggings (1516), on plain-clothes undercover duty (1513). Sometime before they heard Sandusky's screams, the two officers noticed McCummings and company loitering suspiciously on the uptown station platform (136, 1516). The officers decided to avoid calling attention to themselves by walking upstairs to the station's entrance (1516). Suddenly they heard screams (138-39).

The officers, their weapons drawn, ran into the station, with Rodriguez leading (138, 139). As they reached the top of stairway PL-5, they saw Woods, the lookout, standing silently on the stairway (139, 1517). Mead, still following Rodriguez, continued running down PL-5. Before she reached the landing she saw McCummings and Wise strangling and beating the elderly Sandusky (147, 1517). Rodriguez shouted "Police don't move!" (149, 323, 1518). Mead then heard several shots being fired in rapid succession but did not actually see Rodriguez firing his weapon.

After reaching the landing, Mead turned the corner, and saw McCummings, 20 feet away, face down on the bottom of stairway PL-6 (168). The other robber, Wise, was sprinting away on the downtown platform (166). Mead ran after him, but Wise eluded

her (168, 2000). Wounded in the arm (2040) by one of Rodriguez' bullets, Wise was eventually captured at a local hospital (2040).

Rodriguez' account

The two people with the most direct knowledge of the shooting, Rodriguez and McCummings, gave widely divergent accounts of what happened. Rodriguez testified he ran into the station and down PL-5, after he heard Sandusky's screams (1517). As he ran down PL-5, his weapon drawn (1517), Rodriguez saw McCummings and Wise choking and robbing Sandusky on the PL-5/PL-6 landing (1517). Rodriguez reached the landing and shouted "Police, don't move!" (1518), but Wise and McCummings ignored his warning; they lunged at him. To defend himself Rodriguez fired five shots (1575), two of which hit McCummings (1997) and one Wise (2037). The 39 year old Rodriguez (1985) then pursued the 23 year old McCummings (888) who ran down PL-6 until he collapsed on the downtown platform (1524).

Respondent's version

McCummings' account of the shooting differed considerably. He admitted that he was robbing and beating Sandusky (896-97, *cf.* 25-26; *see* App. F, 69a), but denied ever lunging at Rodriguez. To the contrary, before Rodriguez reached the landing, Woods, the lookout, yelled out "Yo" (897), a signal for McCummings and Wise to flee. McCummings immediately dashed down PL-6 and had just reached the downtown platform when two shots, fired by Rodriguez from the top of the landing, 17-20 feet away (36, 86, 1076, 1660), struck him in the back. One of the bullets transected McCummings' spine, and he collapsed immediately. (*See generally* 762-64).

* * *

The two sides may have disagreed about many of the details of the shooting, but a solid core of fact remained unshakeable. First, it was indisputable that Sandusky screamed for help and that Rodriguez heard those screams. Sandusky testified he screamed (319). McCummings' accomplice admitted that Sandusky screamed (2040), and Meade, Rodriguez' partner, also testified that Sandusky screamed (138, 234). Rodriguez himself swore that

he heard screams, which sounded as if someone were dying (1517, 1519).

Secondly, it was established that Rodriguez saw in Sandusky a badly beaten, old man, the victim of a violent felony. Rodriguez testified that he actually saw Sandusky being strangled (1521) and other police officers who arrived at the scene sometime later described a bleeding, badly beaten and barely conscious Sandusky (382, 424, 436). Sandusky, in fact, had to be hospitalized for his beating (382). Combined with the presence of a lookout and two fleeing suspects, these facts gave Officer Rodriguez ample cause to believe that McCummings had committed a violent felony, and was seeking to elude capture.

Nor is there any doubt that Rodriguez shouted a warning. Rodriguez (1518), Meade (149) and Sandusky (323) all testified to the warning, and McCummings never denied that Rodriguez warned him to stop. Finally given the fact that the 39 year old Rodriguez was being outpaced by the 23 year old McCummings who had opened up a 20 foot lead, Rodriguez had no choice but to shoot or allow McCummings to escape.

In short, argued the Authority, if *Garner* allowed an officer with probable cause to believe that the fleeing felon had ". . . committed a crime involving the infliction or threatened infliction of serious harm, [to fire a weapon] . . . if some warning has been given . . ." at p. 11, then Rodriguez was legally justified to shoot McCummings and Wise, *even* under McCummings' version of events.

Legal contentions

Respondent disagreed with the Authority's understanding of *Garner*, arguing that under *Garner* the police could never use a weapon solely to capture a fleeing felon, no matter how violent the felony committed, unless the felon threatened the officer's or another's safety (Appendix G, p. 74a, Appendix H, p. 76a). True, New York's Penal Law §35.30, the "justification" statute expressly authorized an officer to use a weapon to capture a violent fleeing felon. But to the extent that the Penal Law clashed with respondent's understanding of *Garner*, it was the Penal Law which would fall as constitutionally offensive (*see* 75a-76a

The parties' contentions—why a federal question is at stake in this suit and why this Court has jurisdiction to hear this case

The parties' respective legal contentions deserve added emphasis for a critical reason. The Court of Appeals' majority stated that the suit was submitted to the jury on a theory of "common law negligence" (2a) which, if true, would deprive this Court of jurisdiction to hear this case. The majority's statement is flatly, grotesquely, perversely untrue.

From the trial's beginning, respondent and petitioner may have argued about many things, but both agreed that liability was to be governed solely by *Tennessee v. Garner*, 471 U.S. 1 (1985). As respondent remarked in his trial memorandum: "The controlling case in situations involving the use of deadly force to apprehend unarmed fleeing felons is *Tennessee v. Garner*, 471 U.S. 1 (1985)" (Appendix F, p.69a).

As the trial continued (Appendix H p.75a-76a) the parties argued about what *Garner* meant, but again both sides agreed that *Garner* alone controlled (*see* 81a). Thus, respondent's "request to charge" (*see* Appendix G p.72a-74a) cited *Garner* as controlling and quoted directly from that case. Request "4", a typical example (73a), quotes *Tennessee v. Garner*, 471 U.S. at 11-12 verbatim, except that it substitutes "the New York statute" for the Tennessee statute, and cites two additional cases which applied *Garner*.

The trial court, acceding to the request of both parties (75a), said often that it would charge *Garner* to the jury (*see* 78a-79a), a promise it kept. The charge (*see* Appendix J p.82a-86a) focuses solely on *Garner* and Penal Law §35.30 which the trial court understood, correctly, mirrored the *Garner* standard (80a). *See Heath v. Henning*, 854 F.2d 6 [2nd Cir. 1988].

The jury itself thought that it was supposed to apply *Garner*. During deliberations, it sent a note to the trial judge seeking guidance on "Law on use of deadly force, Penal Code §35.30 of the Supreme Court" (87a).

Additionally, all five justices at the Appellate Division agreed the case was decided under *Garner*. *See McCummings v. NYCTA*, 177 A.D.2d 24 (1st Dept. 1992). Typical are the remarks of

Justice Milonas, the majority opinion's author. He rejected a challenge the Authority mounted to the retroactive application of the 1986 *Garner* decision to the 1984 McCummings shooting by noting:

> Yet, since defense counsel not only did not object to reliance upon *Tennessee v. Garner, supra,* but acknowledged that *Garner* is both controlling and retroactively applicable, defendant may not for the first time before this court endeavor to disclaim the relevance and applicability of *Garner* . . .
>
> Appendix "B" p.20a

The Appellate Division dissenter Justice Rubin also agreed that the case's outcome rested on the meaning of *Garner.* After noting that the trial court had dismissed respondent's claim that the Authority was negligent in training Officer Rodriguez, Judge Rubin noted: ". . . the remainder of the action is founded upon the United States Supreme Court's decision in *Tennessee v. Garner.* . ." (35a). Moreover, he went on, ". . . there is a general agreement between the parties to the case that *Garner* is dispositive. . . " (36a).

In light of the Court of Appeals decision that the case was submitted to the jury on "common law negligence", it is worth noting the trial judge's opinion on that issue:

> I am not charging negligence in this case. I am charging basically whether or not the use of deadly force, deadly physical force was justified or unjustified and the plaintiff has the burden of proof of establishing the lack of justification.
>
> (Appendix I, p.81a)

These remarks were echoed by Justice Rubin, at the Appellate Division.

> The gravamen of plaintiff's action, however it may be expressed in his complaint, is the intentional tort of assault and battery. There is no doubt that a battery was committed. Officer Rodriguez admittedly fired two bullets into the back of Bernard McCummings, as the IAS

> Court repeatedly reminded the jurors during the course of delivering its instructions.
>
> (Appendix B, p.47a)[2]

In short, given the unanimity at trial, as well as on appeal, where respondent argued that *Garner* controlled, only one conclusion is possible. *Garner's* meaning was the only issue in this case, "[a fact which] . . . plaintiff conceded by his own evidence in the civil case . . ." (*McCummings v. NYCTA*; Appendix A, p.14a, Bellacosa, dissenting).

Under its own principles of appellate review, the Court of Appeals could not have affirmed a judgment on common law negligence, even had respondent requested it to do so on appeal. This is so because for more than 100 years the Court of Appeals has insisted that ". . . a judgment must stand upon the case as it went to *the jury* . . ." *Wasson v. Pettit*, 117 N.Y. 118, 121 (1889); *Shapiro v. City of New York*, 32 N.Y.2d 96, 101, fn.5 (1973); *Lichtman v. Grossbard*, 73 N.Y.2d 792, 794 (1988); *New York Metro Corp. v. Chase Manhattan Bank*, 52 N.Y.2d 732 (1980); *McMillan v. State of New York*, 72 N.Y.2d 871 (1988). *See also Lefkowitz v. Lebensfeld*, 51 N.Y.2d 442, 447-48 (1980). See also *Gordon v. American Museum of Natural History*, 67 N.Y. 836, 837 footnote (1986). Indeed so strongly has the Court maintained that parties would be bound by the theory submitted to the jury that it has affirmed judgments even when the jury decided a case on an untenable theory of law. (*See e.g. Brown v. Du Frey*, 1 N.Y.2d 190, 194 [1956], Court affirms judgment awarding damages for libel contained in will.)

Here of course, it was not respondent, but the Court of Appeals itself which injected "common law negligence" into this suit. In doing so, the Court, again violated its own precedent. An Appellate court, the Court noted, could not grant relief on "a new theory of recovery first introduced by the Appellate Court against a party who

[2]True, respondent's complaint pleaded a cause in negligence. Early in the suit respondent had contended that he had nothing to do with mugging Sandusky, and that he was struck by stray police bullet, fired by a negligent Rodriguez. At trial, respondent, who was imprisoned on his *own plea of guilty*, admitted that he robbed Sandusky, but argued that Rodriguez nevertheless violated his rights by shooting him (*see* p.69a).

had no notice or opportunity to defend against that theory." *Collucci v. Collucci*, 58 N.Y.2d 834, 837 (1983). As an intermediate New York Appellate Court, following *Collucci's* lead, phrased it, ". . . by any standard it would be unusual behavior for an appellate court to reach and determine an issue never presented in litigation and to do so without providing an opportunity for the adversely affected parties to be heard on a question which they had no reason to believe was part of the litigation. . ." *Grant v. Cuomo*, 130 A.D.2d 154, 175 (1st Dept. 1987), aff'd 73 N.Y.2d 820 (1988).

* * *

As this Court noted only recently, the question of whether a particular state court judgment rests on an "adequate" state ground is itself a federal question which this Court reviews *de novo*. (See *Howlett v. Rose*, 496 U.S. 356 (1990); See also *Michigan v. Long*, 463 U.S. 1032, 1038 (1983); *Staub v. City of Baxley*, 355 U.S. 313, 318-319 (1958). "To hold otherwise would open an easy method of avoiding the jurisdiction of this Court." *Terre Haute & Indianapolis R. Co. v. Indiana*, 194 U.S. 579, 589 (1904).

Thus, this Court has rejected conclusions of state courts purporting to rest on "adequate" state grounds where the state ground proved to be ill-founded or a sham (*see e.g. Postal Telegraph Cable Company v. City of Newport*, 247 U.S. 464 [1918]), or where the stated ground has "no fair support in the record" (see *Ancient Egyptian Order v. Michaux*, 279 U.S. 737, 744 [1929]; cf. also *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 234 [1969]).

The record in this case is so one-sided, that one reading it can only gape at the Court of Appeals' characterization of this suit as a "common law negligence" action. Hence, if this Court looks beyond the state court's words to the reality which belies them, it should grant certiorari to review the federal question necessarily passed upon by the Court of Appeals.[3]

[3]The fact that the jury was also told to consider Penal Law §35.30 does not change matters since P.L. 35.30 largely tracks *Garner* and is certainly no stricter. (*See Heath v. Henning*, 854 F.2d 6, 9 [2nd Cir. 1988]). Indeed *this* Court cited to Penal Law §35.30 as falling within a class of statutes which passed constitutional muster under *Garner*. (*See Garner* at p.17, fn.18; *see also Crawford v. Edmonson*, 764 F.2d 479, 482, fn.2 (7th Cir. 1985).

Proceedings below

The jury verdict and the subsequent appeals

A New York County jury found that Rodriguez was not justified in firing his weapon and awarded McCummings approximately $4,300,000 in damages. The Authority appealed the decision to the Appellate Division, First Department, which in a 4-1 vote affirmed the judgment. *(See McCummings v. New York City Transit Authority,* 177 A.D.2d 24 [1st Dept. 1992]; Appendix "B").

The Court of Appeals decision

The Appellate Division granted the Authority leave to appeal to New York's highest court, the Court of Appeals. On April 5, 1993, the Court of Appeals, with two judges dissenting, affirmed the judgment in respondent's favor (Appendix "A", pp.1a-16a). The majority concluded the lawsuit was submitted to the jury on a theory of "common law negligence" (2a). Based on the evidence before it, the jury could decide that even if Rodriguez complied with *Garner,* he still acted unreasonably in using a weapon to capture McCummings.

The Court of Appeals majority also took a narrow view of *Garner's* holding. According to the majority, *Garner* spoke only to the circumstances under which an injured fleeing felon could successfully assert that he had been deprived of his constitutional rights. It had nothing to say, thought the majority, about when a police officer's use of deadly force *would* pass constitutional muster (*see* 3a-4a). As for *Garner's* quote at 471 U.S. 11-12 in which this Court explicitly outlined when a police officer *could* use a weapon without offending the Constitution, the majority apparently sloughed it off as *dicta.*

Finally, continued the majority, even if *Garner* did control, the jury could still second-guess the police officer's decision to shoot and thus find against the Authority.

Two judges dissented. Judge Vito J. Titone concluded the Authority was entitled to judgment as a matter of law.

> Responding promptly to the 72-year old victim's cry for help, the police in this case came upon what was clearly a mugging. What the officers saw and heard when they arrived at the scene left no room for doubt that a crime of

violence involving at least two attackers and a "lookout" had just occurred . . . Given the immediacy of the occurrence, the clear risk of an escape into the labyrinthine subway system and the obvious need to act quickly and without reflection, I would conclude, without reservation, that the arresting officer acted reasonably, as a matter of law when he fired his gun at the fleeing suspect in an effort to prevent him from eluding arrest and remaining free to commit other violent crimes against other innocent victims.

Appendix "A" (7a-8a)

Judge Joseph W. Bellacosa agreed.

In *Tennessee v. Garner* (471 U.S. 1, *supra*) and *Graham v. Connor* (490 U.S. 386, *supra*), the United States Supreme Court set standards for the use of force to apprehend a suspect in a nonpersonal, property-type crime. *Garner* added, however, that "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the inflictions or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape" (*supra*, 471 U.S. at 11). That is precisely this case. . .—a crime of force in actual progress against a person in a place of public transportation—the use of deadly force can be found to be reasonable and justifiable as a matter of law in a civil suit context.

(13a)

REASONS FOR GRANTING THE WRIT

I

Garner and _McCummings_ leave unresolved the recurring question facing law enforcement personnel in every jurisdiction of the United States: Whether the United States Constitution allows police officers to use deadly force solely to capture a violent, unarmed fleeing felon. Moreover, the answer to that question has divided both the Circuit Courts and the legislatures of the various states.

A. _Garner_ creates confusion about what is or is not permissible police conduct

May a police officer shoot an unarmed felon escaping from the scene of a *violent* crime? Or does the Constitution allow the officer to use a gun only to defend himself or others so that the felon must be allowed to escape? The answer to that question turns on an understanding of this Court's decision in *Tennessee v. Garner,* 471 U.S. 1 (1985).

The *Garner* Court found that the use of deadly force to capture a teenaged felon, fleeing after burglarizing an empty house was an unreasonable "seizure" as a matter of law.

> The use of deadly force to prevent the escape of all suspects, whatever the circumstances is not constitutionally reasonable . . . Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.
>
> *Garner* at p. 11.

The *Garner* court then went on to outline the circumstances under which a police officer *could* use deadly force to capture a fleeing felon.

> Thus, if a suspect threatens the officer with a weapon, or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of

> serious physical harm, deadly physical force may be used if necessary to prevent the escape, and if, where feasible, some warning has been given.
>
> *Id.* at p. 11-12

Garner's holding would seem to leave little doubt that a police officer could use deadly physical force to capture a felon who had committed a violent crime. Nevertheless, *Garner* contains both *language* and *reasoning* that could be used to advance the extreme position of the *McCummings* court:

> We conclude [said the *Garner* court] that [deadly] force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.
>
> At p. 1

A surface reading of this paragraph suggests that an officer could never fire a gun to capture even the most sadistic fleeing felon, if the felon was simply trying to escape and had no interest in engaging the officer in a shootout.

Then, too, some of *Garner's reasoning* lends itself to the extreme conclusion endorsed by *McCummings*. *Garner* rejected Tennessee's argument that the common-law rule which allowed police officers to shoot *all* fleeing felons assured that a higher percentage of criminal suspects would be brought to the bar of justice.

> The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion.
>
> *Garner* at p. 10

Taken to its logical conclusion, this reasoning bars the police from using a gun to capture any suspect, violent or not. By shooting the suspect dead, the police officer brings "the criminal justice mechanism" to a halt, whether the suspect is a non-violent felon like Garner, or a violent one like McCummings.

The *Garner* court also noted that the common-law rule allowing a police officer to shoot any felon had to be understood in its historical context. The rule arose at a time when all felons were

routinely executed. (*Garner* at p. 13-14). Hence, the means used to capture the fleeing Garner were disproportionately severe to the punishment he ultimately faced if captured, since burglary is no longer a capital offense.

But few violent felonies, even rape, robbery, manslaughter, assault, are punishable by death. *Garner's* reasoning would mean that unless a police officer had reason to believe that a fleeing felon had committed a capital felony, the officer could not use a weapon to capture him.

In short, there is an unresolved tension between *Garner's* rationale which argues against a police officer ever shooting at a fleeing felon, except in self-defense, and *Garner's* explicit holding that a police officer may shoot a felon fleeing from a violent crime. The uncertainty created by *Garner* can only be dispelled by the court which created it: the United States Supreme Court.

B. Certiorari should be granted because the Circuit Courts have reached different conclusions about what *Garner* means.

Garner's ambiguities have predictably resulted in a split among the Circuit Courts about what police conduct is permissible.

Most federal Courts have adopted the Authority's understanding of *Garner:* A police officer with reason to believe a felon is fleeing from a violent felony can use deadly force without offending the Fourth Amendment. *See e.g. Krueger v. Fuhr,* 991 F.2d 439 (8th Cir. 1993); *Smith v. Freland,* 954 F.2d 343 (6th Cir. 1992); *Ryder v. City of Topeka,* 814 F.2d 1412, 1419 (10th Cir. 1987). *See also Henry v. Perry,* 866 F.2d 657 (3rd Cir. 1989); *Ford v. Childers,* 855 F.2d 1271 (7th Cir. 1988, en banc); *Ramos-Ayala v. Diaz-Martinez,* 707 F.Supp. 75, (D.P.R. 1988).

Not all Circuits have agreed. In *Griffin v. Hilke,* 804 F.2d 1052 (8th Cir. 1986) the Circuit Court concluded that it was improper to grant summary judgment in a suit with strong *Garner* implications. Police Officer Hilke received a radio report that an armed fugitive, Griffin, suspected of armed robbery, was heading his way. Hilke soon spotted Griffin, fleeing with a coat draped over his arm, apparently hiding a gun. Hilke gave chase but when

Griffin opened up a 40 foot lead and was about to escape he fired his gun, wounding Griffin in the leg.

The Eighth Circuit citing to *Garner*, refused to dismiss the suit against Officer Hilke, even though it accepted the officer's assertion that he believed the fleeing Griffin was armed. *Griffin* at p. 1055. *Garner*, the Eighth Circuit held, allowed a police officer to use deadly force ". . . [only if]the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others . . ." *Id.* at p. 1056. Since the fleeing Griffin, though armed, had no intention of engaging the officer in a shootout—to the contrary, he was simply trying to get away—Officer Hilke had no right to fire a gun solely to capture him.

In addition to the direct conflict *Hilke* presents, one other Circuit case employs reasoning inconsistent with *Garner* and its progeny. In *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992) the Court, reversing summary judgment granted in favor of defendant police officer, noted that the officer pursued by a wounded felon should have tried to hide first, rather than fire his weapon. (*Hopkins* at 886-87). It is true that the officer might have saved himself had he followed the Court's advice to run away and hide. By doing so, however, he would have increased the chance that the felon would escape. The *Hopkins* Court appeared to assume that a police officer could never fire a weapon solely for the purpose of effecting a capture, an assumption at odds with the views of the other Circuit Courts.

The Circuit Courts have also disagreed about another element of *Garner*, the *nature* of the *warning* a police officer must give before he shoots. *Garner* required "some warning", "if feasible" (*see Garner* at pp. 11-12) which the Court in *Ford v. Childers*, 855 F.2d 1271, 1276 (7th Cir. 1988) held was satisfied by the shout of "halt, police". *See also Krueger, supra.* Other Courts require more, understanding *Garner* to hold that the officer must explicitly warn of his intention to use deadly force; a simple "stop, police" is not enough. *See Acoff v. Abston*, 762 F.2d 1543,

1547 (11th Cir. 1985); *Pruitt v. City of Montgomery,* 771 F.2d 1475, 1482 (11th Cir. 1985). Both positions draw plausible support from *Garner's* ambiguous declaration that "some" warning be given. The Court should resolve an ambiguity it itself has created.

C. The legislatures of the various states have also disagreed about when *Garner* allows police officers to use deadly force.

That *Garner* itself left a great deal of uncertainty is also evident in the way many states responded to the decision. In *Garner* the court found that 19 states had justification statutes resembling the Tennessee statute which the Court condemned as constitutionally suspect.

As a result of *Garner,* many of these states rewrote their justification statutes, but the way in which they did varied widely. Some of them adopted statutes similar to New York's Penal Law §35.30, which allows a police officer to fire a weapon to capture a violent felon. (*See e.g.* Florida. Stat. Ann. §776.05(3), Illinois Stat. Ch. 720 §5/7-5(2), Washington Crim. Code §9A.16.040(2)(3). *See also* Tennessee Code Ann. §7-108.

Other states interpreted *Garner* to limit a police officer's use of deadly physical force more severely. Arizona, for example (*see* Arizona Rev. Stat. §13-410c[2] [a-c]), allows a police officer to use deadly physical force only when pursuing one who has committed a felony involving the use of a weapon, or if the officer knows that the fleeing felon "is likely to endanger human life or inflict serious bodily injury to another unless apprehended without delay." This last provision presumably means that a police officer pursuing a husband suspected of killing his wife would not have the right to fire a gun. The officer would have no reason for concluding that the suspect would likely kill in the *future*. This requirement goes well beyond the *Garner* standard.

The states have also differed about the nature of the *warning* the officer had to give before he could fire a weapon. Washington, Illinois, Utah and Florida, in the earlier cited statutes merely parrot *Garner* that "some" warning be given.

Connecticut (*see* Conn. Penal Code §53a-22[c]) and Tennessee (Tenn. Code of Crim. Proc. §40-7-108[b]), have added the pro-

viso the police officer must first warn the fleeing felon that he intends to use deadly physical force. A simple "halt police" is not enough.

The *Garner* decision thus leaves numerous doubts about when law enforcement personnel may use deadly physical force, doubts reinforced by the *McCummings* decision.

D. The *McCummings* decision presents a particularly appropriate vehicle to settle the issues left undecided by *Garner*.

The *McCummings* case presents in pristine form the key question *Garner* left unanswered: whether a police officer may shoot an unarmed felon, fleeing the scene of a violent crime.

The undisputed facts demonstrate that Officer Rodriguez heard blood-curdling screams coming from inside the subway station, a fact which even respondent conceded (*see* Appendix A, p. 7a-8a). Decending the stairway, he saw a brutally beaten man in his seventies, the victim of a vicious mugging and robbery. The old man's attackers, McCummings and Wise, started running away, opening up a nearly 20 foot lead. Rodriguez shouted a warning, but the two continued to run.

As Judge Titone, a McCummings dissenter, concluded, given the immediacy of the occurrence, the clear risk that the two would escape into the labyrinthine subway system and the obvious need to act quickly and without reflection, Rodriguez really only had one choice: shoot or let McCummings escape.

If a police officer, like petitioner's, can be condemned for capturing the two, instead of folding his arms and letting them escape, then the *McCummings* court must be applauded for reaching the right result.

E. The *McCummings* case was incorrectly decided.

In fact, however, the *McCummings* decision is simply wrong. In explicit language, this Court in *Garner* allowed a police officer to do what *McCummings* said he could not (*Garner* at pp. 11-12). Moreover, the *Garner* court, reviewing various state justification statutes, cited with approval New York Penal Law §35.30, which explicitly allows a police officer to shoot a violent fleeing felon (*see Tennesee v. Garner*, at p. 17, ft. 18; *see also*

Crawford v. Edmonson, supra at p. 482, fn. 2). The Authority's understanding of *Garner* is also borne out by the decisions of a majority of post-*Garner* Circuit courts cited before, as well as by the actions of most state legislatures (*see* Petition, *Id.*, at p. 18-21).

Not only *Garner's* explicit holding, but its rationale supports the Authority's interpretation while undermining the Court of Appeals'. *Garner* condemned Tennessee's fleeing felon rule because it believed ". . . numerous misdemeanors involve conduct more dangerous than many felonies." (*See Garner* at p. 14) The statement is true as an abstract proposition, but few crimes are more heinous and dangerous than robbing and strangling a 72-year old man, who but for the intervention of the officers might well have suffocated or died of a coronary.

The *Garner* court also felt that since few burglars are violent, the fleeing teenager in *Garner* was not dangerous enough to be shot (*see Garner* at p. 21). A different situation obtains here. Someone who strangles and beats a frail old man is inherently dangerous. Allowing McCummings to escape would have increased the likehood that he would strike again, targeting the weakest members of society as his prey. (*See especially Ryder v. City of Topeka*, 814 F.2d 1412, 1419 [10th Cir. 1987].)

Nor were there unresolved issues of fact lurking in the record which the jury could have decided against petitioner.

The majority's decision to wring the record dry in order to second-guess the petitioner's police officer runs afoul of *Graham v. Connor*, 490 U.S. 386 (1989). There, the court warned the "police conduct in a deadly force situation must be assessed from the perpective of a reasonable officer on the scene, rather with the 20/20 vision of hindsight." 490 U.S. at 396. By concluding that there were alternatives available to a police officer faced with making a split-second decision of whether to allow McCummings to escape, or to capture him by the only means available, the Court of Appeals was engaging in such second-guessing.

Thus although the Court of Appeals purported to decide this case by looking to the facts, what it did in substance was to

decide the suit on a mistaken view of the law (see *Washington ex rel Oregon R. & Nav. Co. v. Fairchild*, 224 U.S. 510, 526 [1911]), leaving the way open for review by this Court. (*See also Oyama v. California*, 332 U.S. 633 [1948]; *N.Y. Times v. Sullivan*, 376 U.S. 254 [1964]). *In Re Primus*, 436 U.S. 412, 433 (1978).

II

The New York Court of Appeals deprived petitioner of due process by affirming the judgment on a theory which was never presented to the jury or any Appellate Court and which the Authority never had a chance to defend.

Suppose the Court of Appeals had found the Authority liable because Officer Rodriguez had blue eyes and blue-eyed officers are notoriously trigger-happy. No one under those circumstances would deny that the Court of Appeals deprived the Authority of its property without "due process" of law. Neither at trial nor appeal had anyone argued that eye color had any bearing on liability. By introducing a new theory of liability the Court of Appeals would have robbed the Authority of the chance to show that the Court's legal and factual premises were untenable, and that officers with blue eyes were just as competent as officers with eyes of any other shade. Indeed, the Court's decision would have stripped the Authority of the chance to show that Rodriguez was not blue-eyed but brown-eyed instead. What our hypothetical court did in the illustration above is what the Court of Appeals actually did in the *McCummings* case.

As noted, both at trial and on appeal, all sides agreed that *Garner* was solely determinative of liability. The Authority could not have imagined the Court of Appeals would rule against it based on a theory of common law negligence because (1) the Court of Appeals professes not to affirm judgments based on theories which the jury has not considered (*see* Petition, *supra*, p.12); and (2) because the Court of Appeals, under settled precedent could not on its own introduce a new theory to rule against the Authority (*see Collucci v. Collucci*, 58 N.Y.2d 834, 837 [1983]).

Even beyond this, the Authority's surprise at discovering it had lost a simple negligence action is even more understandable for another reason. Contrary to the Court of Appeals, New York does not recognize the tort of "negligent battery", an egregious oxymoron, and the two cases the Court of Appeals cited (*Flamer v. City of Yonkers*, 309 N.Y. 114 [1955], and *Herndon v. City of Ithaca*, 43 A.D.2d 634 [3rd Dept. 1973]) do not prove that it does.

The court in *Flamer* found defendant liable for a "negligent battery" for the simple reason that plaintiff and defendant *agreed* to have the case submitted to the jury on that theory (*see Resp. Brief, Ct. of App. cases*, vol.9518, case 6, available at Supreme Court, Kings County Law Library). The parties were thus bound by the course they charted. *Herndon* arose out of a pure "accident" in which a police officer's gun accidentally discharged during a struggle, striking plaintiff.

By contrast, other New York cases establish that it makes as much sense to speak of a "negligent battery" as it does to speak of shooting someone "accidentally on purpose". *See e.g. Panzella v. Burns*, 169 A.D. 2d 824, 825 (2nd Dept. 1991); *Rafferty v. Arnot Ogden Memorial Hospital*, 140 A.D.2d 911 (3rd Dept. 1988); *Trott v. Merit Department Stores*, 106 A.D.2d 158 (1st Dept. 1985); *cf. Murray v. Long Island Railroad Company*, 35 A.D.2d 579 (2nd Dept. 1970), aff'd 28 N.Y.2d 849 (1971). Moreover, New York's Pattern Jury Instructions, the authoritative statement of New York law, explicitly notes that once a defendant intentionally subjects a plaintiff to non-consensual physical force, "negligence" concerns fall by the wayside; battery becomes the operative tort. (*See N.Y. Pattern Jury Instructions*, Civil, Vol. 2, §3:3, p. 10-11 [Dec. 1992 Supp.]).

Indeed, had the Authority known that this battery and §1983 suit was to be reviewed as a negligence action, it would have tried it differently. It would have focused on McCummings' comparative negligence, thereby reducing its exposure to damages. (*See* New York CPLR §1411). Then, too, instead of trying to prove that Rodriguez' conduct conformed with *Garner*, the Authority could have far more easily demonstrated that Rodriguez's conduct was that of a "reasonable officer", or at the least, that respondent failed to prove that it was not.

The Authority could also have relied on other substantive New York negligence defenses to defeat respondent's claim (*see Barker v. Kallash*, 63 N.Y.2d 19 [1984]; *Abergast v. Board of Education*, 65 N.Y.2d 161 [1985]). Under those decisions, a plaintiff, like McCummings, injured while committing a serious crime, as well as during an act implying assumption of risk, would have been precluded from tort recovery.

In short, the Authority was found liable on a theory it never had a chance to contest, whether at trial or on appeal, a legally untenable theory concocted by the New York Court of Appeals in order to impose a multi-million dollar liability on petitioner, and to defeat this Court's power to hear this suit.

This Court has not hesitated to condemn similar state-appellate court-misconduct which deprived litigants of the process due them under the law. Thus, in *Cole v. Arkansas*, 333 U.S. 196 (1948), petitioners were criminally charged and tried for violating §2 of an Arkansas statute, which was challenged as constitutionally suspect. The Arkansas Supreme Court tried to evade this Federal issue by affirming *as if* petitioners had been tried not for a violation of the constitutionally suspect §2, but the more benign (and entirely distinct) §1 In condemning the state court's action, this Court stated:

> Without completely ignoring the judge's charge, the jury could not have convicted petitioners for having committed the separate, distinct and substantially different offense defined in §1. Yet State Supreme Court refused to consider the validity of the conviction under §2 for violation of which petitioners were tried and convicted. It affirmed their convictions as though they had been tried for violating §1, an offense for which they were neither tried nor convicted.
>
> 333 U.S. at 200, 201 (footnote omitted)

Building on *Cole's* reasoning, this Court in *Spevack v. Klein*, 385 U.S. 511 (1966) found that the New York Court of Appeals which affirmed petitioner's disbarrment on a theory never raised in any proceeding below, deprived petitioner of due process by preventing him from challenging the newly raised theory.

In an array of other cases, this Court, in criminal, quasi-criminal and civil contexts, has condemned decisions by state courts or regulatory bodies which have deprived litigants of their liberty or property without first notifying the litigants of the precise charges or claims against them. *See e.g. Ohio Bell v. Public Utilities*, 301 U.S. 292 (1937); *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 88 (1943); *In Re Ruffallo*, 390 U.S. 544, 550-51 (1968); *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 167 (1962); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965); *Chiarella v. U.S.*, 445 U.S. 222, 235 (1980); *Presnell v. Georgia*, 439 U.S. 14, 16 (1978); *McCormick v. U.S.*, ____ U.S. ____, 111 S.Ct. 1807, 1814 (1991); *Eaton v. City of Tulsa*, 415 U.S. 697 at 697 (1974); *Rewis v. U.S.*, 401 U.S. 808, 813 (1971). *Cf. also Morgan v. U.S.*, 304 U.S. 1, 20 (1938); *In Re Gault*, 387 U.S. 1, 33-34 (1967); *In Re Oliver*, 333 U.S. 257, 273 (1948). *See also Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 678 (1930).[1]

* * *

There are several important reasons why this Court should be disturbed enough by the Court of Appeals' actions to grant the Authority's petition for certiorari. The *McCummings* suit presented a state court with the opportunity to decide important Federal-Constitutional questions. This Court has an overriding interest in guaranteeing that State courts treat litigants who raise federal issues in State forums fairly and justly. That interest remains the same whether the litigants are civil rights claimants in southern courts seeking the equal protection of the laws (*see e.g. Bouie v. City of Columbia*, 378 U.S. 347 [1964]) or government agencies like petitioner who assert defenses that more "progressive" courts like the Court of Appeals might deem politically

[1]The following Circuit Court cases make the same point: *Evans Products v. West American Insurance Co.*, 736 F.2d 920, 923 (3rd Cir. 1984); *Quality CATV, Inc. v. NLRB*, 969 F.2d 541, 545 (7th Cir. 1992); *cf. Facet Enterprises v. NLRB*, 907 F.2d 963, 973 (10th Cir. 1990); *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1256-57 (D.C. Cir. 1968); *Bendix v. FTC*, 450 F.2d 534, 536 (6th Cir. 1971); *NLRB v. Temple-Eastex, Inc.*, 579 F.2d 932, 936 (5th Cir. 1978).

incorrect. Aside from the interests of litigants, this Court also has its own institutional interests to vindicate whenever a state court acts, whether by design or otherwise, to strip this Court of the power to hear important Constitutional cases. (*See Florida v. Meyers*, 466 U.S. 380, 383 [(1984); Stevens, J., dissenting]).

The Court of Appeals' actions should also disturb this Court because the way in which the Court of Appeals disposed of the *McCummings* suit may represent part of a larger trend. Many state courts, dissatisfied with this Court's judicial philosophy have begun disposing of suits implicating federal constitutional issues in a way designed to strip this Court of the jurisdiction.

The Court is doubtless aware that under the rubric of the "new federalism" some state courts, especially New York, have begun to look to their own constitutions to discover rights which this Court, after diligently examining the United States Constitution has been unable to find. (*See e.g. People v. Rosen*, 81 N.Y.2d 237 [1993]; *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235 [1991].)

Whatever the merits of the doctrine (*see* Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich.L.Rev. 761 [1991]), one effect it has had is to strip this Court of the power to hear many state cases since this Court will not hear suits which were disposed of on *bona-fide*, independent state grounds. (*See Immuno AG., supra* at 256). A more insidious effect of the "new federalism" is to implant in the minds of state court judges the notion that the United States Supreme Court does not have the final say on questions of Constitutional law. If a state judge disagrees with a decision of this Court, he or she is now free to look to local constitutional law to chart out or invent new rights.

With these words as a background, the manner in which the court majority disposed of the *McCummings* case stands exposed in a clearer light. What follows is a hypothesis which, farfetched as it may first appear, explains better than any other why the Court of Appeals did what it did in *McCummings*.

Assume a state court like New York Court of Appeals, by now accustomed to short-circuiting appeals to this Court, has before it a case like *McCummings*. Dismissal of *McCummings* seems compelled by *Garner* but the Court of Appeals is of no mind to

dismiss.[2] How to go about affirming the judgment while at the same time blocking petitioner from challenging the Court's action by way of an appeal to the Supreme Court? The Court of Appeals might decide to affirm the judgment on the strength of a State Constitutional provision, but that course has its drawbacks. Were the Court of Appeals to invoke the state constitution, it would be required to explain at length why McCummings was owed greater rights under the New York Constitution than under the Federal Constitution's Fourth Amendment, a difficult task to perform in light of (1) New York's constitutional history (*see* Weissman, *People v. Torres and The Limits of the State Constitutionalism*, 24 Colum. J.L. & Soc. Probs. 299, Sec. IV, [1991]), (2) as well as the legislative history of New York Penal Law §35.30 (*see* New York Session Laws 1968, ch. 843; Liebowitz, *Justifiable Use of Force Under Article 34 of The Penal Law of New York*, 18 Buffalo Law Rev. 285, 286 (1968-69); Wukitsch, *Survey of the Law Governing Police Use of Deadly Force*, 55 N.Y.S.B.J. 12, 16 (1968-69). Then, too, the Court might draw the ire of some of its own members who have questioned the Court's promiscuous resort to the "new federalism" (*see e.g. People v. Vilardi*, 76 N.Y.2d 67 (1990); *Immuno AG., supra*).

What to do? Follow the less complicated course the Court did in *McCummings*. Affirm the judgment on "common law negligence" grounds—knowing that by doing so the odds of the United States Supreme Court agreeing to hear this case are greatly reduced. No other account plausibly explains why the Court of Appeals did what it did in the *McCummings* case.

Strong supporting evidence shows that the Court of Appeals, an aggressive champion of the "new federalism" may be more likely to decide a case in a way which strips this Court of jurisdiction, even at the cost of depriving litigants of due process. The Court of Appeals, it turns out, had already given the "McCummings protocol" an earlier dry-run. In *Patchogue Medford v.*

[2]The majority's sneering conclusion that *Garner* sets forth only a "minimum standard" of conduct brings to mind other New York cases where the Court of Appeals found that this Court's constitutional pronouncements did not come up to snuff (*see Immuno AG., supra* at p.248).

Bd. of Ed., 70 N.Y.2d 57 (1987) the court invalidated a random drug testing program on the ground that it violated *both* the federal and state constitution. The state constitutional challenge was made only in an *amicus* brief to the Court of Appeals, a fact which led Judge Simons to make these remarks:

> ". . . the court's reliance on the state provision is not only contrary to procedural rules—too familiar to require citation—which govern this court, but is also an inappropriate imposition on the respondents and their counsel who, after defending the Board's action against the only ground raised for some two years, now find the proceeding decided against them for reasons of which they were unaware and which they have no chance to address or refute." *Patchogue Medford* at p. 71.

None of this mattered to the Court's majority which was intent on expounding its own constitutional views, while resting its disposition on a nominally independent state ground, thus assuring that this Court would never challenge its views. The trend signalled by *McCummings* and *Patchogue, supra* may be expected to continue. As more state courts become converted to the "new federalism", they may become jealous of their newly established prerogatives. They may begin to view constitutional decision-making as falling within their own domain and will not hesitate to muscle out interlopers, like the United States Supreme Court by whatever means necessary, even at the expense of a litigant's due process rights.

Put differently, a state court intent on issuing constitutional pronouncements or shielding its decisions from Supreme Court review, may be more likely to do what the *McCummings* court did here: Decide a case which the litigants never actually tried, nor argued on appeal, and affirm a judgment on a theory which a defendant never had the chance to defend.

Conclusion

For these reasons a writ of certiorari should be issued to review the opinion and judgment of the New York Court of Appeals.

Respectfully submitted,

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September 1, 1993

APPENDIX.

APPENDIX A—Opinion of the New York State Court of Appeals (April 5, 1993).

COURT OF APPEALS

STATE OF NEW YORK.

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1 No. 32

BERNARD MCCUMMINGS,

Respondent,

v.

NEW YORK CITY TRANSIT AUTHORITY,

Appellant.

Lawrence Heisler, for appellant.

Joel A. Brenner, for respondent.

MEMORANDUM:

The order of the Appellate Division, insofar as it affirmed the judgment of Supreme Court should be affirmed, with costs[1].

[1]The appeal, insofar as it is taken from that portion of the Appellate Division order which affirmed the order of Supreme Court denying defendant's post-judgment motion to vacate and set aside the verdict and judgment, should be dismissed for nonfinality.

A jury awarded a verdict for personal injuries sustained by plaintiff who was permanently paralyzed from the mid-chest down when his spinal cord was severed by a bullet fired by Officer Rodriguez, an employee of defendant. The theory of plaintiff's case as submitted to the jury was common law negligence[2]—*i.e.*, that Officer Rodriguez, in employing deadly physical force in an effort to apprehend plaintiff, did not exercise that degree of care which would reasonably be required of a police officer under similar circumstances (*see, e.g., Flamers v. City of Yonkers*, 309 NY 114; *Herndon v. City of New York*, 43 AD2d 634, 635; Prosser and Keeton, Torts § 26, at 155-156 [5th ed]; 2C Warren's Negligence, § 1.01[2]). According to plaintiff's testimony and other proof, plaintiff was unarmed and running away from the scene of the attempted robbery when Officer Rodriguez shot him in the back. The Appellate Division affirmed with one dissent and granted defendant leave to appeal to this Court.

The principal question is a narrow one: whether the evidence in the record warrants the trial court's denial of defendant's dismissal motion made at the close of plaintiff's case and renewed at the close of the evidence. In deciding whether plaintiff has made out a *prima facie* case for submission to the jury, of course, a court must be "guided by the rule that the facts adduced at the trial are to be considered in the aspect most favorable to [plaintiff] and that [plaintiff is] entitled to the benefit of every favorable inference which can reasonably be drawn from those facts" (*Sagorsky v. Malyon*, 307 NY 584, 586). It is settled that negligence cases by their very nature do not lend themselves

[2]Plaintiff's second cause of action (for defendant's negligent screening, training and supervision of its employees) and his third cause of action (for violation of his fourth amendment rights brought under 42 USC § 1983) were both dismissed at the close of plaintiff's case.

to summary dismissal "since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (*Ugarriza v. Schmieder*, 46 NY2d 471, 474; *see also, Andre v. Pomeroy*, 35 NY2d 361, 364-365).

Here the evidence presents sharp factual issues. The key question—whether Rodriguez saw a violent crime in progress—is disputed. Plaintiff testified that when he was shot he had fled down a flight of stairs and was already some distance away from the scene of the attempted robbery and from Officer Rodriguez who was at the top of the stairs. Plaintiff stated that he was running *away from* Officer Rodriguez when Officer Rodriguez fired and hit him twice in the back. Officer Rodriguez, on the other hand, testified that the shooting occurred at the top of the stairs. Plaintiff and his companion, according to Rodriguez, were lunging *toward him* and only four feet away when he fired. Corroborating plaintiff's testimony are the following items of proof: plaintiff was shot in the back; blood was found only on the platform at the bottom of the stairs where plaintiff was lying; according to expert testimony plaintiff could not have run down the stairs after the bullet severed his spinal cord; both the victim and the officer accompanying Rodriguez testified that plaintiff did not lunge at Rodriguez. The victim himself testified that he was standing against the wall when the officers approached, and plaintiff fled down the stairs before shots were fired.

Defendant cites the Supreme Court's decision *Tennessee v. Garner* (471 US 1) and argues that that case, in some way, entitles it to a dismissal. But the rule in *Tennessee v. Garner* deals with the protections guaranteed by the Federal Constitution for the *person being arrested*—not for the arresting police officer or the municipality. It establishes the minimum standard of care which a police officer must exercise

in making an arrest to avoid violation of the arrestee's Fourth Amendment rights. Contrary to defendant's contention, *Tennessee v. Garner* does not create a limitation on plaintiff's right to recover or a shield of immunity for a municipal defendant in a common law negligence action. Even if the constitutional standard of care under *Tennessee v. Garner* were adopted as the precise standard for common law negligence, there would still be factual issues requiring a trial including, most significantly, whether it was reasonable for Rodriguez to believe that the use of deadly force was appropriate and necessary under the circumstances.

Nor, again contrary to defendant's contentions, is there any basis for dismissal under Penal Law § 35.30. Penal Law § 35.30 sets forth the circumstances when a police officer, charged with criminal conduct for using deadly physical force in making an arrest, can claim that the conduct was justified and, therefore, not criminal. The question of whether a police officer's conduct is justified in a criminal case is, of course, a factual matter for the jury. Similarly, if Penal Law § 35.30 were used as the sole measure of the standard of care required of Officer Rodriguez here, there would be triable issues for the jury including whether plaintiff could have reasonably believed that deadly force was appropriate and necessary under the circumstances.

Although the dissenters would have it otherwise, this is a negligence case governed not by federal law but by the common law of this State. In deciding the case we must, of course, take the view of the evidence most favorable to the plaintiff. The factual issues were sharply defined: whether Officer Rodriguez came upon the scene during or after the mugging; whether Officer Rodriguez saw any evidence that plaintiff had committed a violent crime; whether, firing from the top of the stairs, Officer Rodriguez hit the unarmed plaintiff in the back and severed his spinal cord while he

was running away at the bottom of the stairs or whether Rodriguez hit plaintiff while he was four feet away and lunging at Rodriguez. It was plaintiff's right to have these factual issues decided by the jury.

The fatal flaw in both dissents is their failure to view the facts in the light most favorable to plaintiff, which the law requires us to do. Instead, the dissent of Judge Bellacosa states that a team of officers "witnessed plaintiff McCummings rummaging through [the victim's] pockets as another mugger held him down in a choke hold" and that "[c]oncededly, [the victim] suffered bodily harm," while Judge Titone's dissent states the police officers "came upon what was clearly a mugging" with a scene that "left no room for doubt that a crime of violence * * * had just occurred." The dissents neglect the crucial fact that the most favorable view of the evidence for plaintiff is that Officer Rodriguez *did not see a mugging* and did not know whether a violent crime had been threatened or committed. Deadly force of course may be appropriate in some circumstances to prevent the flight of a violent felon. However, this record does not support the conclusion, as a matter of law, that deadly force was used for this purpose.

To be sure, plaintiff committed a crime but it is the province of the criminal, not the civil, justice system to punish him for his wrong. He has been convicted and will be dealt with as the law requires. In fulfilling our judicial responsibilities, we may not, as is suggested, depart from established principles of law to avoid what may to some seem to be an unacceptable resolution of the factual disputes.

Defendant's remaining contentions are either unpreserved or without merit.

TITONE, J. (dissenting):

I dissent. It is undisputed that the law permits police officers to use physical force, and even deadly physical force, when reasonably necessary to prevent the escape of a fleeing felon who has committed a violent crime. Nothing in the recent Supreme Court case law contradicts that obvious legal precept, whose vitality is so critical to the preservation of an orderly society (*see, Graham v. Connor,* 490 US 386; *Tennessee v. Garner,* 471 US 1). Since the archetypal facts in this case fit squarely and neatly within the contours of this fundamental axiom governing law enforcement's prerogatives, I would hold that the police officers' actions in this case were, as a matter of law, reasonable and that, accordingly, plaintiff's tort claim should not have been submitted to the jury.

Like my dissenting colleague Judge Bellacosa, I begin with the recognition that questions involving the reasonableness of a particular actor's conduct are ordinarily reserved for resolution by a trier of fact (*see, e.g., People v. Harrison,* 57 NY2d 470, 477-478; *Ugarriza v. Schmieder,* 46 NY2d 471, 475-476; *Andre v. Pomeroy,* 35 NY2d 361; *Sadowski v. Long Isl. R.R. Co.,* 292 NY 448, 455). However, this "established" principle of procedural law (*see,* slip op., at p 6) does not provide an automatic entree to a jury (*Andre v. Pomeroy, supra*). As we have noted on many occasions, the courts still have the duty to "make the threshold determination as to whether the plaintiff, by introducing adequate evidence on each element, has made out a case sufficient in law to support a favorable verdict" (*Basso v. Miller,* 40 NY2d 233, 241-242). Where such a threshold showing has not been made, "the case should go no further" and the claim should be dismissed "as a matter of law" (*Akins v. Glens Falls City School Dist.,* 53 NY2d 325, 332).

The need for thoughtful application of these principles with a view toward weeding out truly meritless claims is particularly acute in cases such as this involving claims of excessive force by the police. Confrontations between police officers and criminal suspects often—indeed, almost necessarily—involve an element of force. Thus, some clear boundaries for what does and does not constitute "reasonable" force must be delineated as a matter of law, lest every pursuit and arrest resulting in injury lead to a fully litigated tort case that must be submitted to a jury. The specter of civil juries regularly and routinely weighing the "reasonableness" of police conduct during the course of an arrest in much the same manner as they would weigh the reasonableness of an automobile driver's responses to a traffic situation is an unacceptable outcome, particularly in light of the likely chilling effect that such an outcome would have on the efforts of law enforcement personnel. In the presence of such weighty policy considerations, we should not be hesitant to dismiss claims of excessive force where the police conduct in question can readily be characterized, as a matter of law, as reasonable.

This case provides a classic illustration of when such a disposition is appropriate. Responding promptly to the 72-year-old victim's cry for help, the police in this case came upon what was clearly a mugging. What the officers saw and heard when they arrived at the scene left no room for

doubt that a crime of violence involving at least two attackers and a "lookout" had just occurred.[1] Further, as even plaintiff's evidence indicated, the attackers attempted to flee down a flight of steps and through a subway passageway as soon as they were alerted to the presence of the police. Given the immediacy of the occurrence, the clear risk of an escape into the labyrinthine subway system and the obvious need to act quickly and without reflection, I would conclude, without reservation, that the arresting officer acted reasonably *as a matter of law* when he fired his gun at the fleeing suspect in an effort to prevent him from eluding arrest and remaining free to commit other violent crimes against other innocent victims. Any other conclusion would cast a serious pall on the ability of the police to do the job society has assigned them: preventing crime and apprehending violent criminals.

BELLACOSA, J. (dissenting):

Affirming this plaintiff's $4.3 million jury award against the Transit Authority is not required or supportable under sound legal principles. This case should not be driven by general nostrums pertaining to ordinary negligence cases. Therefore, I respectfully dissent, vote to reverse the order of

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[1]It is true, as the majority observes (slip op., at p 6), that, according to plaintiff's evidence, Officer Rodriguez might not have actually seen the mugging. Nonetheless, even plaintiff acknowledges that the officers arrived at the scene in time to hear the 72-year-old victim's cries for help as well as the lookout's warning and to see plaintiff and his cohort fleeing down a nearby staircase. Under any view of the facts, those observations are sufficient to support a reasonable belief by the officer that a violent crime had just occurred and that the perpetrators were about to escape.

the Appellate Division, and would dismiss the plaintiff's case outright.

Plaintiff McCummings was one of the muggers who attacked Jerome Sandusky, 72 years of age, in the 96th Street-Eighth Avenue line subway station on June 28, 1984. A team of on-duty undercover transit police officers responded to Sandusky's cry for help, and witnessed plaintiff McCummings rummaging through Sandusky's pockets as another mugger held him down in a choke hold. Concededly, Sandusky suffered serious bodily harm.

On the most favorable view of the evidence to plaintiff, he was caught in the act of committing an all-too-common subway attack on a particularly vulnerable target of opportunity. He broke off from the attack only to avoid arrest by attempting to flee the crime scene after an alert from his lookout. The officer, who fired his weapon and seriously wounded the perpetrator-turned-plaintiff, testified that the plaintiff and another of the muggers, only several feet away, lunged at him when he rushed into the crime scene. The officer's attempt to rescue the victim and arrest the culprits consumed only seconds. As a defendant in the criminal proceeding, the plaintiff in this civil action pleaded guilty to robbery in the second degree. Ironically, his criminal sentence is capped by a multimillion dollar recovery against the citizenry at large.

The dispositive issue is whether the defendant City Transit Authority's motion to dismiss the excessive force civil claim by McCummings should have been granted. I conclude that the evidence irrefutably supports the view that the officer acted reasonably and without excessive force, as a matter of law, under Penal Law section 35.30, *Tennessee v. Garner* (471 US 1) and *Graham v. Connor* (490 US 386). Thus, I am baffled by the inversion of justice wrought in this case. The New York justification statute and the United

States Supreme Court precedents combine to create a special duty universe within which to assess the standard of care by which to measure the officer's response to an emergency violent crime situation.

That special duty universe involving municipal tort liability is ignored by the Court. Instead, it treats this case as a plain negligence claim governed by *pro forma* rubrics. The transit officers' paramount job was to stop the criminal assault and robbery, and to apprehend those committing the dangerously illegal acts in their presence. Indeed, that was the special obligation of this antimugger subway patrol unit. These are features which make this case different and call for distinct, realistic and proportionate rules of governmental responsibility and judicial review.

The fact that reasonableness of conduct, including that of municipal agents, is ordinarily a jury question (*see, Dunn v. State of New York,* 29 NY2d 313; *Stanton v. State of New York,* 26 NY2d 990, *rearg denied* 27 NY2d 817), does not compel the result here driven by procedural generalities. In effect, the "majority would again delegate to the jury the responsibility to determine the applicable social policy, thus abdicating the judicial role" (*Basso v. Miller,* 40 NY2d 233, 243 [Breitel, ChJ, concurring]).

This Court has expressly recognized that not every case in which the ultimate issue is reasonableness must end with a jury. The Court has instead manifested prudential suppleness in its substantive and procedural rules governing municipal liability. Thus, in *Akins v. Glens Falls City School District* (53 NY2d 325, *rearg denied* 54 NY2d 831), the Court found the question of a municipal duty of reasonable care resolvable as a matter of law. Similarly, in *Andre v. Pomeroy* (35 NY2d 361), this Court reversed an order of the Appellate Division and granted the plaintiff's motion for summary judgment that the defendant was negligent as a

matter of law. While the Court acknowledged the rarity of using summary judgment in negligence cases, it realistically ruled that the defendant's negligence was "conclusively established," since her behavior "could not be considered reasonable conduct under any standard and it does not take a trial to resolve that point" (*id.*, at 365). The Court's refusal to apply that principle here for another exceptional situation, on the opposite side of the liability spectrum, is rigidly uneven, because if negligence can be conclusively established as a matter of law on summary judgment, all the more should lack of negligence be susceptible to a directed verdict motion, after all plaintiff's evidence has been presented (*see also, Carter v. City of Chattanooga,* 803 F2d 217, *on rehg* 850 F2d 1119, *cert denied* 488 US 1010; *Pruitt v. City of Montgomery,* 771 F2d 1475, *rehg denied* 771 F2d 704; *Ramos Ayala v. Diaz Martinez,* 707 F Supp 75).

Since the eclipse of general municipal immunity, this Court has not shirked its common law responsibility of restoring appropriate policy-based barriers to otherwise open-ended municipal liability. In *Weiss v. Fote* (7 NY2d 579, *rearg denied* 8 NY2d 934), the Court determined that the State could not be held liable for the alleged faulty placement of a traffic signal. The Court recognized the exercise of municipal expert discretionary judgment in planning for the public safety as follows:

> Nothing in the legislative history of the Court of Claims Act * * * indicates that the waiver provision was designed to override the well-defined and carefully reasoned body of law governing the measure of the State's responsibility for highway safety. The city's defense which we here sustain rests not on any anachronistic concept of sovereignty, but rather on *a regard for sound principles of government ad-*

> *ministration and a respect for the expert judgment of agencies authorized by law to exercise such judgment. In the area of highway safety, at least, it has long been the settled view * * * that courts should not be permitted to review determinations of governmental planning bodies under the guise of allowing them to be challenged in negligence suits* (*id.*, at 588 [emphasis added]).

Realism in the realm of public safety is the touchstone of that case and its holding.

By contrast, the instant case approaches the surreal zone. It involves split-second decisions by public safety employees made in the most dangerous and volatile circumstances—here, transit officers rushing into ongoing, highly dangerous and violent criminal activity. These public safety employees are surely no less expert than city planners who decide, with relaxed reflection, where a stop sign or a traffic signal belongs. The *Weiss* rationale thus helps to support dismissal of this case and avoidance of counterproductive second-guessing exercises (*see, Dunn v. State*, 29 NY2d 313, *supra; Stanton v. State*, 26 NY2d 990, *supra*).

Allowing criminal defendants involved in the commission of violent felonies to reach civil juries as a matter of course on the issue of excessive force taunts the concepts of evenhanded justice. This plaintiff, a convicted mugger, can readily gain a lottery-size verdict against the public fisc while faultless citizen victims, like the elderly person in this case, are blocked from even their day in court for gross police nonfeasance under special duty municipal barriers (*contrast, Weiner v. Metropolitan Transp. Auth.*, 55 NY2d 175; *see, e.g., Kircher v. City of Jamestown*, 74 NY2d 251; *Merced v. City of New York*, 75 NY2d 798; *see also, Santangelo v. State*, 71 NY2d 393). The fact that some distinc-

tions emerge in cases involving various municipal duty categories underscores the need for a limiting analytical and dispositional path. Notably, our Court has also withheld negligence recoveries from injured persons, as matter of policy line drawing, when they assume certain risks (*see, e.g., Turcotte v. Fell*, 68 NY 2d 432; *Akins v. Glens Falls City School District*, 53 NY2d 325, *supra*). If nothing else, this plaintiff should be deprived of his windfall against the municipal pocketbook on the public policy and theory that he assumed the risk of his injuries as part of the hazards of his chosen predatory pursuits.

In *Tennessee v. Garner* (471 US 1, *supra*) and *Graham v. Connor* (490 US 386, *supra*), the United States Supreme Court set standards for the use of force to apprehend a suspect in a nonpersonal, property-type crime. *Garner* added, however, that "if the suspect threatens the officer with a weapon or *there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm*, deadly force may be used if necessary to prevent escape" (*supra*, 471 US, at 11). That is precisely this case. Thus, while the reasonableness inquiry is an objective one (*Graham v. Connor, supra*, at 397; *see also, People v. Goetz*, 68 NY2d 96), where, as here, the facts and circumstances fall even more compellingly within the template painted by *Garner*—a crime of force in actual progress against a person in a place of public transportation—the use of deadly force can be found to be reasonable and justifiable as a matter of law in a civil lawsuit context.

Furthermore, the Court's holding today undermines the Legislature's exceedingly plain policy on justification, expressed in the pertinent self-defense provision of the Penal Law, section 35.30:

> 1. A police officer or a peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person who he reasonably believes to have committed an offense, * * * may use deadly physical force for such purposes only when he reasonably believes that: (a) The offense committed by such person was: (i) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person;

That statute reflects, with *Garner,* the public policy that the use of deadly force to apprehend a criminal in the actual commission of or escape from a violent felony is unquestionably lawful and reasonable. Plaintiff conceded as much by his own evidence and theory in the civil case and by his plea of guilty in the criminal case. I cannot imagine a more precise tracking of the words and commands of Penal Law 35.30 than the actions taken by the officer on this subway platform.

The Court disregards the statute's and *Garner's* cogent relevancy by sidetracking the procedural context of the situation. Moreover, its characterization of the pertinent rule as a one-way proposition benefitting only criminal actors is puzzling. *Garner,* like this case, was a civil suit for damages sustained as a result of the alleged use of excessive force in apprehending a suspect. The United States Supreme Court plainly intended that its Fourth Amendment analysis for assessing the lawfulness of the use of deadly force should also be applied to the issue of reasonableness of the actions of the law enforcement officials and their municipal superiors (*Tennessee v. Garner, supra,* 471 US, at 22). In now holding that the standard enunciated in *Garner* applies

only to the issue of the "arrestee's Fourth Amendment rights" (Majority opn, at 4), the Court wastes *Garner's* guidance. The anomaly inflicted is that "[t]he imposition of such liability, in addition to posing a crushing financial burden, might well discourage" law enforcement officers and their superiors from acting to promote the general welfare (*O'Connor v. City of New York*, 58 NY2d 184, 191, *rearg denied* 59 NY2d 762). Tort law, after all, is intended to shape and conform conduct to reasonable patterns.

In sum, the application in this case of staple negligence nostrums of a procedural and substantive variety will result in inappropriate cases being universally pitched to juries, whose potentially excessive determinations are beyond this Court's review powers on almost all issues. As foreseen in *O'Connor v. City of New York* (*id.*), the devastating toll includes shifting the primary concern of law enforcement employees from ensuring the safety of the public to ensuring that they and their municipal employers are not exposed to staggering money judgments for, in effect, doing their jobs of crime prevention. The costs to society of such calculated indifference to innocent citizens in dire need are compounded by the payments of large judgments out of a diminishing public purse. This case guarantees that society will suffer the double albatross of both those costs. This plaintiff-mugger may have been interrupted and prevented from stealing Sandusky's wallet, but he ultimately makes crime pay by picking the public's pocket for the big score of 4.3 million dollars, plus interest.

* * *

Order, insofar as it affirmed the judgment of Supreme Court, affirmed, with costs, in a memorandum. Appeal, insofar as taken from that portion of the Appellate Division

order which affirmed the order of Supreme Court denying defendant's post-judgment motion to vacate and set aside the verdict and judgment, dismissed upon the ground that that portion of the order does not finally determine the action within the meaning of the Constitution. Chief Judge Kaye and Judges Simons, Hancock and Smith concur. Judge Titone dissents in part and votes to dismiss the appeal in part and reverse in part in an opinion. Judge Bellacosa separately dissents in part and votes to dismiss the appeal in part and reverse in part in an opinion.

Decided April 5, 1993

APPENDIX B—Opinion of Supreme Court, Appellate Division, First Department (February 20, 1992).

SUPREME COURT, APPELLATE DIVISION

First Department, April 1991.

John Carro, J.P.
E. Leo Milonas
Betty Weinberg Ellerin
David Ross
Israel Rubin, JJ.

BERNARD MCCUMMINGS,

Plaintiff-Respondent,

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant-Appellant.

43114-15

Appeal by the defendant-appellant from a judgment of the Supreme Court, New York County (Leonard N. Cohen, J.), entered on March 8, 1990 which, following a jury trial, found in favor of the plaintiff and awarded damages in the total amount of $4,343,721.24, and from an order of

said court entered on May 14, 1990 which denied defendant's motion to set aside the verdict.

Joel A. Brenner, of counsel, (Jonathan Cory Scott with him on the brief; David Breitbart, attorney) for plaintiff-respondent.

Lawrence Heisler, of counsel, (Anita Isola and Lawrence A. Silver with him on the brief; Albert C. Cosenza, attorney) for defendant-appellant.

MILONAS, J.

At approximately 8:00 P.M. on June 28, 1984, Jerome Sandusky was attacked by a number of youths in the 96th Street station of the Eighth Avenue subway line in the course of an abortive robbery attempt. Two Transit Authority police officers, Christine Mead and Manuel Rodriguez, who were on undercover patrol, heard the elderly victim's screams and came to his assistance. As the officers approached the staircase with their guns drawn, one of the culprits, Nathan Woods, evidently acting as the lookout, yelled "Yo". Two other perpetrators, Jacob Wise and plaintiff Bernard McCummings, were on top of Sandusky at the lower level, the former with a choke hold around the victim's neck and defendant rummaging through his pockets; some of Sandusky's belongings were strewn about the floor. The parties offered differing versions as to what transpired next. According to Officer Rodriguez, he identified himself, shouting, "Police don't move", but both Wise and plaintiff lunged at him, thereby causing him to discharge five shots. Two of the bullets struck McCummings in

the back, one severing his spine and rendering him a paraplegic.

McCummings admitted that he was engaged in robbing and beating Sandusky but claimed that after being alerted by Woods' signal, he broke off the assault and fled down the other staircase in the opposite direction. He stated that he was some seventeen to twenty feet away from Officer Rodriguez when he was shot in the back. Plaintiff denied that he ever lunged at the officer. Plaintiff's medical expert testified that McCummings' spinal cord was immediately transected and that he instantly lost all weight bearing capability, and since he was found at the bottom of the stairs that is where he was shot. Defendant offered no credible medical evidence to the contrary. Officer Rodriguez asserted that despite plaintiff's wounds, plaintiff was able to run down a stairway before collapsing. On the direct examination of Officer Rodriguez, the jury heard him testify about three prior incidents involving the use of his firearm. The shootings were found to be "justified" by the Transit Authority. Officer Rodriguez twice before shot at fleeing suspects and missed, the first time firing twice, the second time emptying his gun. On another occasion, Officer Rodriguez shot and killed a stray dog which was apparently rummaging through his garbage can.

The jury, clearly accepting McCummings' account of the incident, found that Officer Rodriguez had used excessive force against plaintiff, who had previously pleaded guilty to robbery and spent some three years incarcerated in state prison. The panel then awarded him a total of $2.5 million for past and future pain and suffering, $622,142.55 for future medical supplies and equipment and $1.2 million for future nursing and other home care services. In that regard, it should be noted that the evidence demonstrates that one of the bullets that entered from the back and transected his

spine caused total paralysis from the mid-chest down, resulting, among other things in complete and permanent loss of urinary, bowel and sexual function. On appeal, defendant New York City Transit Authority has advanced a series of contentions which have either not been preserved or do not constitute reversible error.

Defendant urges that the action should have been dismissed pursuant to Penal Law 35.30 and the decision of the United States Supreme Court in *Tennessee v. Garner*, 471 U.S. 1, or alternatively, that the holding in that case is not germane to the instant situation and, in any event, should not have been retroactively applied to this matter. Yet, since defense counsel not only did not object to reliance upon *Tennessee v. Garner, supra*, but acknowledged that *Garner* is both controlling and retroactively applicable, defendant may not for the first time before this court endeavor to disclaim the relevance and applicability of *Garner* (CPLR 5501[a][3]; *De Long v. County of Erie*, 60 NY2d 296, 306; *Derdiarian v. Felix Contracting Corp.*, 51 NY2d 308, 317). Similarly, the Transit Authority failed to advise the trial court that it deemed it improper to charge the jury pursuant to the standard of reasonableness of an officer's conduct as enunciated in *Tennessee v. Garner, supra*, and defendant may not now advance such an argument on appeal (CPLR 4110-b). Defendant's assertion of qualified immunity is also precluded as not having been preserved and even on the merits is without substance inasmuch as the Transit Authority could be liable under the doctrine of *respondeat superior* (*Frazier v. State of New York*, 64 NY2d 802).

In *Tennessee v. Garner, supra*, the Supreme Court declared that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no

immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so" (at 11). Therefore, in the view of the Court therein, where "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force" (at 11). One indicator cited by the Court as illustrative of the danger presented by the suspect is whether he menaces the officer with a weapon.

It is significant that defendant never challenged the legal validity of any portion of the trial court's lengthy charge concerning the use of physical force by a police officer. Defense counsel merely requested that the court read to the jury the actual language of Penal Law 35.30, as well as a specific paragraph in *Tennessee v. Garner, supra,* notwithstanding that the statute and the Supreme Court ruling had been exhaustively explained to the members of the panel. The Transit Authority, insisting that Officer Rodriguez had no way of knowing whether or not the perpetrators were armed, appeared to believe that quoting from the subject Penal Law section and legal authority, could somehow benefit the defense's position but, as the trial judge pointed out, Officer Rodriguez testified that the assailants' arms were outstretched and lunging at him without being in possession of any deadly weapons. Indeed, to the extent that the court provided an advantage to either party, it was more likely to have been to defendant than plaintiff by, for example, emphasizing that the burden of proof rested upon the plaintiff with respect to each and every element relating to the officer's use of deadly force.

Defendant also complains that the court improperly permitted the jury to consider the Transit Authority's 1982 and 1986 rules and regulations. First, it should be pointed out

that defendant's attorney never protested the admission of the 1982 regulations nor ever moved that they be stricken. If anything he acquiesced in their introduction into evidence and even affirmatively utilized these regulations in examining various witnesses both on direct and cross. Not until the precharge conference did defendant's lawyer assert that the 1982 regulations imposed a higher standard than the Penal Law or *Tennessee v. Garner, supra*, and that they not be included in the jury instructions. Although the court denied the request, it stated that it would merely direct the panel to consider the regulations in deciding whether or not Officer Rodriguez acted with a reasonable belief that he was justified in the use of deadly force, and this is what was done. Defendant, in its appellate belief, concedes that it did not object to the admission of 1982 rules and regulations but argues disingenuously that they were only relevant as to claims subsequently dismissed (such as the allegation that the Transit Authority had negligently failed to train its officers regarding the appropriate use of deadly force) and, thus, not submitted to the jury. Yet, this is not a distinction ever put forward by defendant to the court; its only concern appeared to be with the standard for employing deadly force.

Further, contrary to defendant's contention that the 1982 regulations set more stringent requirements than otherwise mandated by statutory or case law (see *Lesser v. Manhattan and Bronx Surface Transit Operating Authority*, 157 AD2d 352, which held that internal operating rules must be excluded if they compel a standard transcending reasonable care), they do no more than authorize transit authority officers to apply deadly physical force in response to a felony involving or threatening physical force. The 1982 regulations provide in pertinent part that:

> The minimum level of force will be used whenever preventing or terminating a crime, or when arresting a person for a crime. A firearm or other deadly physical force will only be used when any other level of force is insufficient to effect police control of a felony involving physical force or imminent use of physical force against oneself or another.

Not only did the foregoing rule not impose a stricter standard but it largely follows the dictates of Penal Law 35.30. Equally noteworthy is that Captain John Doyle of the Manhattan-Bronx Task Force and defendant's own witness, testified that the Supreme Court ruling in *Tennessee v. Garner, supra,* actually limited the reliance upon force; therefore, the 1982 regulations had to be amended to raise the degree of care to that necessitated by *Garner.* Accordingly, defendant's position with regard to the 1982 regulations is simply unsupportable.

As for the 1986 regulations, which were promulgated in direct response to *Tennessee v. Garner, supra,* the court, over the Transit Authority's objection, initially allowed their introduction during the recross-examination of Captain Doyle because it had concluded that defense counsel had "opened the door." Thereafter, lawyers for both parties had Captain Doyle read from and interpret the regulations. The next day, defendant unsuccessfully moved for a mistrial due to the admission of the 1986 regulations. Plaintiff's attorney agreed to withdraw them from evidence, and the court, striking from the record all reference to these rules and regulations, charged the jury that it disregard any testimony relating to the 1986 regulations (the panel was never supplied with the regulations themselves). While delivering its final instructions to the jury, the court again advised against considering any evidence that had previously been stricken.

There is absolutely no basis here to find that the jury did not comply with the court's curative instructions or that the testimony involving the subject regulations was so damaging so as to taint the entire trial even if the jurors had failed to follow the judge's admonition.

The dissent's difficulty in accepting the meaning of *Tennessee v. Garner, supra,* is demonstrated by the implied criticism directed against the reasoning of the majority of the United States Supreme Court therein. Yet, notwithstanding the dissent's apparent dissatisfaction with *Tennessee v. Garner, supra,* defendant not only never challenged its applicability but, instead, accepted that the ruling in that case was controlling here. Indeed, the requests for charge which were submitted to the judge by the parties were exchanged in advance, and defendant certainly had the opportunity to present his own requests and to contest plaintiff's proposal. Yet, an examination of the recharge conference conducted by the court reveals that defendant agreed with the judge's entire proposed jury instructions, except in one particular. Thus, the following conversation occurred between the court and the parties' counsel.

> THE COURT:. . .With respect to five, request five—do you have any objection if I should define—I don't know why I have to define "serious physical injury."
>
> MR. SIERADZKI [plaintiff's attorney]: That would only have applied had you used the language of *Garner,* which makes reference to serious physical harm or injury, to define that term would have some meaning. But since you're not using that term—
>
> THE COURT: I will be using that term.

MR. SIERADZKI: Then it should be defined. The jury has the right to know.

THE COURT: I will be using the term of a deadly weapon. A police officer is defending himself or believes that it's necessary to defend himself from what the officer reasonably believes the use or imminent use of deadly physical force. I will add "or serious physical harm."

MR. SIERADZKI: Then you should define that, too.

There is a Penal Law definition in the 1984-85 Penal Law, which you're reading to them from 3530 [*sic*].

MR. KUZMACK [defendant's attorney]: I would submit, your Honor, that we don't know what the *Garner* Court meant by "serious physical harm."

MR. SIERADZKI: We can interpret *Garner.*

If we're interpreting it in New York, for purposes of a New York trial, then you have a right to interpret a Federal Court which interprets a Tennessee statute, so that it applies to a New York statute.

MR. BREITBART [plaintiff's other attorney]:That's the definition in the New York Panel Code.

THE COURT: Well, that may not be the definition of "serious physical injury" under the civil statutes of the no-fault threshhold civil statutes.

MR. KUZMACK: That's correct, your Honor.

THE COURT: It's an entirely different thing.

MR. BREITBART: We're talking about 3530[*sic*], which is a penal statute.

THE COURT: That's true.

MR. SIERADZKI: And we're using the Penal Law to define that penal statute term.

How can you use a civil statute term to define a penal statute?

THE COURT: It's also defined differently now. It's in here somewhere.

MR. SIERADZKI: I read it.

(Discussion off the record)

THE COURT: I will also charge this, referring to five.

I will define "serious physical injury."

MR. KUZMACK: Respectfully except, your Honor.

Defendant's attorney did not, significantly, offer a suggestion for a possible alternative charge or even explain the precise reasons for his objection. Yet, pursuant to CPLR 4110-b:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court, out of the hearing of the jury, shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Moreover, CPLR 5501(a) (3) limits review by the Appellate Division to ". . . any charge to the jury, or failure or refusal to charge as requested by the appellant, to which he objected." Thus, it is axiomatic that a purported error in a judge's charge is not preserved for review unless it is clearly

brought to the court's attention prior to the case being sent out for consideration by the jury (*De Long v. County of Erie, supra; Derdiarian v. Felix Contracting Corp., supra*), and an objection is deemed waived if it does not unambiguously and explicitly apprise the court of the alleged error and expressly request the pertinent charge sought (*Moore v. Leaseway Transportation Corp.*, 49 NY2d 720; *DiSalvo v. Bortle*, 58 AD2d 997; see also Weinstein, Korn & Miller, 4 New York Civil Practice, CPLR 4017). As the court clearly observed in *Petosa v. City of New York*, 52 AD2d 919, the objection to a charge "must state the matter to which objection is being made and the grounds for such objection. A general objection is not sufficient where the correct charge might have been obtained by specifically calling to the trial court's attention the alleged error and the reason for such error" (at 920). Therefore, the defense lawyer's unadorned "[r]espectfully except, your Honor" was scarcely adequate to preserve for review the single disagreement which he voiced with the court's proposed jury instructions.

Ironically, the minutes of the precharge proceedings reveal that the court spent considerable efforts to prune plaintiff's request to charge, often at defendant's request and over the expressed dissatisfaction of plaintiff's counsel. Specifically, the court granted in its entirety (except for one minor item not in issue on appeal) defendant's request to charge, stating that "[w]ith respect to defendant's request to charge, I will charge everything here". The rules of preservation serve the salutary purpose of giving fair notice to the trial court and to the adverse party of the claimed error and the proposed solution. Allowing a party to seek reversal on appeal on an unpreserved error is inherently unfair both to the jurist whose conduct is being reviewed and to the adverse party who had no meaningful way to respond to the claimed error. This is especially so where, as here, during an

extensive charge conference defense counsel claimed ignorance on the law and stood mute when plaintiff's proposed charge relating to "serious physical harm" was being analyzed and negotiated. Furthermore, the court, most significantly, granted defendant's request to charge in its entirety.

Defendant's claim that the judge erred in not reading as a whole section 35.30 of the New York Penal Law is similarly not preserved for appellate review. On several occasions, in two separate charge conferences, the court advised the attorneys that he agreed with their assessment that the case was controlled by section 35.30 of the New York Penal Law and *Tennessee v. Garner, supra*. He stated that he would not read the statute but would charge its substance, as well as the holding of *Tennessee v. Garner, supra*, and that he would "paraphrase" the statute. Defense counsel did not object to this ruling and did not specifically request the reading of the statute in his extensive request to charge. Defendant did offer his own version of the Penal Law and *Tennessee v. Garner, supra*, in his written request to charge, and this was in fact incorporated at length into the judge's charge to the jury. Defendant's request to read section 35.30 came for the first time after the judge's charge and when the jury was about to deliberate. Nowhere in the record, however, is there a single objection pointing to any claimed error in the charge relating to the Penal Law section or any suggestion as to how or where the court may have gone astray. The judge's position was that his charge was "[s]ubstantially consistent with the Penal Law Sections". Since defendant failed to point out to the court where it had erred, it must be assumed that the court was correct.

As for the criticism raised by the dissent concerning the court's charge as to what "level" of force was reasonable or excessive, it is notable that defendant did not assert this at trial. Moreover, in a Second Circuit case, *Heath v. Henning*,

854 F.2d 6, cited by the dissent, the court reversed a jury verdict in favor of defendant police officers because the court had used an incorrect standard in instructing the jury on the officers' use of deadly force in effecting an arrest and remanded the matter for a new trial. According to the Second Circuit, which relied both on *Tennessee v. Garner, supra,* and section 35.30 of the New York Penal Law, "[t]he legal standard to be applied in cases where a police officer has used deadly force against a fleeing felony suspect is one of reasonableness under the Fourth Amendment" (at 8), and "[t]he proper standard requires that a jury consider whether the officers acted reasonably, under the totality of the circumstances, in using deadly force to effect the arrest" (at 9).

It is evident that the "level" of force which may be employed by officers is that which a jury regards as reasonable under the circumstances of the particular case. Defendant never disputed that this was an issue to be resolved by the jury at trial. The defense attorney specifically acknowledged that "the justifiableness of a shooting can only be judged by legal standards. The legal standards are 3530[*sic*], the Penal Law, and *Tennessee v. Garner.*"

The issues which the jury had to determine are minimized by the truncated version offered by the dissent as the "central question." Throughout the trial there were two distinct and conflicting scenarios offered by the parties. According to the court, "as I see it, it is the plaintiff's claim that the shooting occurred while the plaintiff was unarmed, had already fled, had already released the victim and already fled down the stairway and was shot in the back at the bottom of the stairway. That is the plaintiff's claim. . . . On the other hand, the defendant's contention is that the shooting did not occur that way at all." Defendant's lawyer then responded, "No, your Honor. It occurred

because the police officer was threatened with serious physical injury, and that he fired two shots at McCummings, and McCummings was shot while standing on the landing and that he ran down the stairs after being shot." The parties agreed that it was a clear matter of fact for the jury as to whether "the plaintiff was shot while lunging at the officer and that the officer was reasonable to believe he was in fear of his life or that deadly physical force was being used against him, or whether he was shot escaping" (stated by Mr. Kuzmack, the defense counsel).

One must discard or severely edit both fact versions developed by the testimony at trial to form the "central question" offered by the dissent, i.e. "[w]hether an officer employed by the defendant New York City Transit Authority used excessive force by shooting plaintiff McCummings in order to effect his apprehension while in the immediate flight from the mugging of an elderly man." Yet, even viewing the issue as stated, the inexcapable conclusion is that it still poses many questions for resolution by the jury, and, as described by the dissent in discussing the difficulties in attempting to interpret and apply the ruling of *Tennessee v. Garner, supra*, "[t]he conclusion to be drawn is that *Garner* contemplates that such an assessment will be made *ad hoc*, based upon the facts presented", and "[i]ndeed the courts that have confronted the problem seem to have adopted this perspective." This is precisely the role that the jury fulfilled in this case.

The dissent endeavors to set up a straw man, never even suggested by defendant, to the effect that plaintiff is seeking recovery on both Fourth Amendment and tort grounds and that these doctrines are separate and distinct and mutually exclusive. Thus, almost everything involved in this case is now tainted by the "confusion" surrounding these two contradictory claims, particularly the instructions delivered to

the jury regardless of whether or not actually objected to by the defense. This does not, however, prevent the dissent from recommending remand of this case for a new trial in which the jury would presumably decide whether Officer Rodriguez acted reasonably under the circumstances therein, precisely what he deems to be a matter of constitutional interpretation but which is, in reality, a question of fact. While the courts do establish constitutional standards, it is the jury which determines if the particular conduct in dispute comported with these standards. The jury is certainly not being called upon to make constitutional rulings as such. Further, since tort claims may clearly arise out of the violation of constitutional rights, there is no conflict between the two theories. They are simply different concepts, and the dissent has confused their meaning and application. The dissent, similarly, appears to perceive a potential discord between the New York State Penal Law and current judicial interpretation of the Fourth Amendment. Yet, defendant evidently does not share his concern and has never asserted this proposition. There is certainly no legal authority to support such a possibility.

The errors claimed in the charge which are raised by the defendant or *sua sponte* by the dissent are either nonexistent or insignificant and unpreserved. A reversal by this Court would require a rejection of the jury's fact-finding and its replacement with our own or penalizing the wrong party for unpreserved error. Either result would be a serious deviation from, and an abuse of, the authority which this court has on review.

Finally, as the Court of Appeals stated in *Caldwell v. The New Jersey Steamship Company,* 47 NY 282 (at 286-287):

> Where a legal proposition is presented for prompt decision, in such a variety of forms, with slight

> variations of language, it would be extraordinary if expressions could not be found which, considered separately, would not be obnoxious to criticism; but an appellate court will not seize hold of isolated portions of a charge for that purpose. If the charge, as a whole, conveyed to the jury the correct rule of law, on a given question, the judgment will not be reversed, although detached sentences may be erroneous; and if the language employed is capable of different constructions, that construction will be adopted which will lead to an affirmance of the judgment, unless it fairly appears that the jury were, or at least might have been, mislead.

Consequently, the judgment of the Supreme Court, New York County (Leonard N. Cohen, J.), entered on March 8, 1990, which, following a jury trial, found in favor of plaintiff and awarded him damages in the total amount of $4,343,721.24, should be affirmed, without costs or disbursements. Order of the Supreme Court, New York County (Leonard N. Cohen, J.), entered on May 14, 1990, denying defendant's motion to set aside the verdict, is affirmed without costs or disbursements.

> All concur except Rubin, J. who dissents in an Opinion.

RUBIN, J. (dissenting)

The central question in this case is whether an officer employed by defendant New York City Transit Authority used excessive force by shooting plaintiff McCummings in order to effect his apprehension while in immediate flight from the mugging of an elderly man. The leading case in

this area is *Tennessee v. Garner* (471 US 1), and while there is no substantive dispute as to its relevance, the scope of its application under the markedly different factual circumstances and statutory context of this case is sharply contested. Even the procedure by which a statutory provision is examined under the reasonableness standard enunciated in *Garner* is unsettled at this time. Given the potential exposure to liability (the judgment awarded in this case exceeds $4.3 million), the novelty of the legal issues presented and their significance to law enforcement, it is appropriate that the courts take a measured approach to their resolution.

I regard the *Garner* case as a narrow ruling with considerably more limited application than is perceived by the majority of this court and by other courts which have construed it. As I view the opinion, *Garner* imposes an external limit in circumstances where a resort to force authorized under state law leads to a constitutionally unreasonable result. I consider the New York State law on justification (Penal Law Article 35) to be a fair and comprehensive statute, consistent with the Fourth Amendment reasonableness considerations articulated in *Garner*, which can be expected to produce a constitutionally acceptable result in the vast majority of situations to which it is applied.

I am also of the opinion that, while the *Garner* Court abandoned, as arbitrary the common-law distinction between felony and misdemeanor as a criterion for the use of deadly physical force, it did not abandon the distinction between the seriousness of crimes (particularly as reflected in their violence) which the common law endeavored to reflect. In this regard, I do not apprehend *Garner* as inviting or requiring a wholesale reassessment of which criminal acts are violent or dangerous in their commission.

Transit Officer Manuel Rodriguez was on plain clothes patrol with his partner, Christine Mead, at the 96th Street

subway station on the "A" line. They observed Bernard McCummings and his accomplices, Nathan Woods and Jacob Wise, acting suspiciously in the subway station but, at the time the assault took place, the officers had gone up to the street to avoid attracting the attention of the trio. Woods, who acted as lookout, positioned himself at the top of a stairway while McCummings and Wise carried out the assault on the landing, halfway down to the platform level. The victim, nearly 72 years of age, was punched in the face and choked by one assailant, Jacob Wise, while McCummings removed his watch, his wallet and the loose change from his pockets. Officer Rodriguez heard the victim's cries for help and encountered this scene as he ran down the subway steps (although whether during or immediately after the assault is a factual issue), followed closely by Officer Mead. According to the victim's testimony, Officer Rodriguez announced, "Drop him and freeze," whereupon the three culprits fled. (Rodriguez and his partner testified that he shouted, "Police, don't move,") Officer Rodriguez discharged five shots, two of which struck McCummings in the back, causing injury to the spine and rendering him a paraplegic. Another bullet struck his accomplice, Jacob Wise, in the upper right arm. McCummings collapsed at the bottom of the stairway and was arrested at the scene. Jacob Wise escaped Officer Mead's pursuit and was later arrested at the emergency room of St. Luke's Hospital where he had sought treatment for his gunshot wound. Nathan Woods also ran from the scene and was later arrested by members of the Major Case Investigation Unit, acting on information supplied by Jacob Wise. Bernard McCummings subsequently pleaded guilty to attempted robbery in the second degree (Penal Law §160.10) which is a violent felony offense (Penal Law §70.02[1]). The Firearms Discharge Review Committee of the New York City Transit Police Department

ruled that the shooting was "justified and within department guidelines."

At issue on this appeal is whether the jury was properly instructed on the criteria to be applied in determining if the shooting of McCummings was justified or if it represented an excessive use of force by the police officer. Defense counsel, in objecting to the court's instructions (R 1689; 1909), urged that the relevant factors to be considered by the jurors are found in Section 35.30 of the Penal Law, which permits an officer to use deadly physical force when he reasonably believes it to be necessary to prevent flight and "when he reasonably believes that: (a) The offense committed by such person was: (i) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person".

McCummings' claim against the New York City Transit Authority states three causes of action alleging, respectively, excessive use of force, negligent training and supervision and violation of rights under the United States Constitution. The IAS Court dismissed the cause of action for negligent training and supervision at the close of plaintiff's case. The remainder of the action is founded upon the United States Supreme Court's decision in *Tennessee v. Garner* (471 US 1, *supra*), an action brought pursuant to 42 USC §1983 claiming a violation of the plaintiff's civil rights. That action arose out of the fatal shooting by a police officer of an unarmed, 15-year-old suspect for the sole purpose of preventing his flight following the burglary of a private residence. The Supreme Court, recognizing that circumstances exist where the use of deadly force against a fleeing felon is justified, ruled that the Tennessee statute was constitutional on its face but was unconstitutional as applied to the facts before the court.

Because there is general agreement between the parties to this case that *Garner* is dispositive of the issue presented, it is appropriate to analyze the opinion more closely to determine its impact upon State law. Its holding is that a statute which permits "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable" under the Fourth Amendment (471 US 1, 11). Applying this concept to the facts before it, the majority stated, "A police officer may not seize an unarmed, nondangerous suspect by shooting him dead" (*Id.*). From the Court's discussion of the common law, it is clear that the rationale supporting this conclusion is that the distinction between felony and misdemeanor as a predicate for the use of deadly force is no longer viable. "In short, though the common-law pedigree of Tennessee's rule is pure on its face, changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied" (471 US 1, 15). The unadorned rule is, therefore, that deadly force may not be employed to apprehend a suspect solely because the crime for which he is sought is classified as a felony.

The result follows readily from the facts as perceived by the majority of the Court. Edward Garner was a 15-year-old eighth-grader, 5 feet 4 inches tall and weighing between 100 and 110 pounds, who stole $10, a ring and a purse from a house (471 US 1, 4, N2 & 4). No one was home at the time of the burglary which, the opinion stresses, is classified by the F.B.I. as a "property" crime and not a "violent" crime (471 US 1, 21). The majority was convinced that the officer who shot Garner did not fear for his personal safety, recognized the suspect was unarmed and fired at him only because Garner was climbing a fence and about to get away (471 US 1, 21). Even conceding the legitimate governmental interest in law enforcement, including the goals of effec-

tiveness in making arrests and encouraging the peaceful submission of suspects, the majority stated, "we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects" (471 US 1, 10).

In place of the common-law distinction between felony and misdemeanor, *Garner* derives justification for the use of deadly force from the *danger* which the fleeing suspect represents. Examining the facts before it, the Court concluded, "Although the armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous" (471 US 1, 21). The indicia of "dangerousness" which the majority consider appropriate are stated in the alternative: "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon *or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm,* deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given" (471 US 1, 11-12 [emphasis added]).

Because it was confronted with a *nonviolent* felony perpetrated by an unarmed 15-year-old, the Court in *Garner* focused its attention on whether the fleeing suspect presented a threat of imminent harm *to the apprehending officer* and to bystanders. It should be readily apparent, however, that where a suspect poses a threat of serious injury to an officer or others, it is irrelevant that he may have committed a predicate felony, a misdemeanor or no crime at all because deadly physical force may be employed to neutral-

ize the threat, as a matter of self-defense of the officer or protection of the public (*see*, Penal Law §35.30[1][c]). Because of the gross factual dissimilarity to the case at bar, the guidance provided by *Garner* is limited to the result that the time-worn distinction between felony and misdemeanor as a basis for the use of deadly force has been supplanted by the distinction between crimes "involving the infliction or threatened infliction of serious physical harm" and crimes of lesser violence.

The dissenting Justices in *Garner* complained that the majority failed "to outline the additional factors necessary to provide 'probable cause' for believing that a suspect 'poses a significant threat of death or serious physical injury' * * * when the officer has probable cause to arrest and the suspect refuses to obey an order to halt" (471 US at 32). The majority opinion does not discuss the newly-formulated rule and no examples of crimes which warrant the use of deadly force to apprehend a suspect are provided. The Court does not supply a definition of the term "serious physical harm". There is no discussion of the public policy to be advanced by allowing police officers to shoot those suspected of more violent crimes to effect their arrest while permitting those suspected of less violent crimes to escape. Nor does the Court articulate the nature of the danger posed by the escape of a violent felon, although some indication may be gleaned from a footnote concerning a difference of opinion with the three dissenting Justices over the relevance of certain statistics. In dismissing their significance, the majority state, "That has nothing to do with the question here, which is whether the fact that someone has committed a burglary indicates that he has committed, *or might commit, a violent crime*" (*Tennessee v. Garner, supra*, at 22, n 23 [emphasis added]). The Court does, however, acknowledge the problems attendant upon application of the formulated

rule by officers in the field, stating, "We do not deny the practical difficulties of attempting to assess the suspects dangerousness" (471 US 1, 20).

The conclusion to be drawn is that *Garner* contemplates that such an assessment will be made ad hoc, based upon the facts presented, allowing the process of the common law to refine the concept of dangerousness through accumulated precedent. Indeed, the courts that have confronted the problem seem to have adopted this perspective. For instance, in *Heath v. Henning* (854 F2d 6, 9 [2d Cir 1988]), the court ruled that *Garner* required consideration of "whether the officers acted reasonably, under the totality of the circumstances, in using deadly force to effect the arrest * * *. While the Fourth Amendment test does take into account the officer's knowledge, e.g., whether an officer is aware that the suspect is armed or dangerous, or knows whether the alleged felony involved violence, its primary focus is on the attendant circumstances and the objective reasonableness of the officer's actions".

In cases which arise under a statute which takes a common-law approach to the use of deadly force, the courts have out of necessity, applied the *Garner* standard exclusively. For example, in *Davis v. Little* (851 F2d 605 [1988]), the Second Circuit Court of Appeals was confronted with a Connecticut statute which permitted the use of deadly force where the officer was attempting to apprehend "a person whom he reasonably believes has committed a felony" (851 F2d 605, 608, n 1), the very basis for the use of force found untenable in *Garner.* Under these circumstances, the court simply ignored state law, stating, "as *Garner* itself makes clear, the existence of a state statute does not fix the progress of constitutional law" (851 F2d 605, 610). However, where the state law reflects the standard enunciated in *Garner,* an altogether different situation is presented for, as

Garner also makes clear, state law is controlling unless, when examined under the Fourth Amendment "objective reasonableness" standard (*see, Graham v. Connor*, 490 US 386 [1989]), it is "constitutionally unreasonable" as applied to the facts of a given case (*Tennessee v. Garner, supra*, at 11-12). Unfortunately, the distinction is one which, thus far, seems to have escaped attention.

Penal Law §35.30 represents the law of this State with respect to the uses of deadly force by a police officer in the apprehension of a fleeing felon. Unless a determination is first made that the statute is unconstitutional, either on its face or as applied to the facts of a given case, there is no reason to depart from the standard of conduct which it espouses. The rule enunciated in *Tennessee v. Garner* is the relevant standard by which a statute is judged to accord a felon his rights under the Fourth Amendment. No decision has been brought to this court's attention, and none has been found, which has held Penal Law §35.30 to be unconstitutional as applied to facts similar to those at bar (*see, Estate of Jackson v. City of Rochester*, 705 F Supp 779 [WDNY 1989]; *see also, Merzon v. County of Suffolk*, 767 F Supp 432 [EDNY 1991]). To the contrary, the Second Circuit Court of Appeals has noted that Section 35.30 of the Penal Law "requires the jury to conduct precisely the same analysis as does the reasonableness standard of *Garner*" (*Heath v. Henning, supra*, at 9). The Circuit Court has further held that a violation of the statute does not necessarily constitute a violation of the Fourth Amendment because "not every instance of force proscribed by state law rises to the level of a constitutional violation so as to support a section 1983 [42 USC 1983] action" (*Finnegan v. Fountain*, 915 F2d 817, 821 [2d Cir 1990]).

The opinion in *Heath v. Henning* (*supra*), however, fails to appreciate the distinction between a case arising under

the common law and one involving a detailed statute utilizing the same criteria for the application of physical force approved in *Garner*. While stressing the similarity between the reasonableness standards in *Garner* and New York's law on justification (Penal Law §35.30), the Second Circuit Court of Appeals nevertheless criticized the District Court's instructions to the jurors on State justification as "ill-advised" and "unnecessary when considering section 1983 liability" (*Heath v. Henning*, 854 F2d at 9, *supra*). The result is that exactly the same analysis is applied as in *Davis v. Little* (*supra*), involving Connecticut's common-law statute: state law is ignored, and the analysis proceeds entirely on Fourth Amendment grounds. This approach is at variance with *Garner*, which requires the court to determine the constitutionality of state law as applied to the circumstances of a suspect's apprehension.

Implicit in the Second Circuit Court's approach is a finding that state law regarding the circumstances in which force may be employed is simply immaterial to a determination of liability arising out of the use of force by a police officer. Had the United States Supreme Court intended to supplant state law in favor of a test predicated entirely on Fourth Amendment grounds, it would undoubtedly have said as much. To the contrary, however, the *Garner* Court stated that where deadly force is used to prevent the flight of a suspect and the officer has "probable cause" to believe the crime involved the "infliction or threatened infliction of serious physical harm", even a statute based upon the common-law felony-misdemeanor distinction "would pass constitutional muster" (*Tennessee v. Garner*, 471 US at 11-12, *supra*). The clear intent of *Garner* is that, once a statute is found to accord a suspect the rights guaranteed under the Fourth Amendment, any liability for injury is to be determined as a matter of state law.

The practical difficulties inherent in the approach adopted by the Second Circuit Court of Appeals in *Heath v. Henning (supra)* become apparent when claims arising under both the Federal Constitution and State law are asserted. An action brought in New York pursuant to 42 USC §1983 is likely to include a pendent State claim which requires application of the criteria contained in Penal Law §35.30 in addition to the *Garner* Fourth Amendment standard, thus presenting an element of confusion about which the Second Circuit Court of Appeals expressed concern (*Heath v. Henning*, 854 F2d at 9, *supra*).

Merzon v. County of Suffolk (767 F Supp 432, *supra*) is a good illustration. There, as here, the plaintiff stated a claim under 42 USC §1983 together with claims under State law. The court first addressed the Fourth Amendment issue, applying the "objective reasonableness" standard derived from *Garner* in *Graham v. Connor* (*supra*), concluding that the plaintiff failed to establish a violation of rights guaranteed by the United States Constitution. The court then addressed the pendant State claim, ruling that the battery committed by the apprehending officer was justified under the criteria set forth in Penal Law §35.30. (The District Court did not, however, undertake any assessment of whether penal Law §35.30 is constitutional as applied to the facts before it.) The plaintiff's third cause of action based on negligent hiring and training was dismissed for lack of proof.

In presenting a case to a jury, there is always a potential for confusion when two different theories of recovery are asserted, each of which requires application of a different legal standard to the same set of facts. The potential is greatly compounded where, as in the matter under review, internal agency regulations are admitted into evidence, introducing yet another theory of recovery based upon a viola-

tion of those regulations. The legal significance of agency regulations can be radically different depending upon the particular cause of action pleaded. For example, operating regulations are obviously material to the adequacy of the training provided by defendant Transit Authority to its police officers. The operative question with respect to the Transit Authority regulations, therefore, is the use which was made of them at trial and not simply the propriety of their introduction into evidence.

Plaintiff McCummings asserts the same causes of action as did the plaintiff in *Merzon* (*supra*) and, as in that case, the cause of action founded upon negligent training and supervision was dismissed by the trial court, rendering unnecessary discussion of the significance and use of the regulations in this regard. Plaintiff's remaining claims state two separate and distinct causes of action to which different legal standards apply and with respect to which defendant's operating regulations must be accorded entirely different treatment. Plaintiff's Fourth Amendment claim questions the reasonableness of police actions and attacks the constitutionality of the State law under which the apprehending officer acted. If, as in *Garner,* the State statute is found to be unconstitutional as applied to the facts of the case, then it is for the trier of fact to determine if any policy or custom of defendant agency was responsible for the deprivation of the plaintiff's Fourth Amendment right to be free from unreasonable seizure (*Tennessee v. Garner,* 471 US at 23, *supra*). In this regard, agency regulations are germane to an assessment of the effort directed to secure compliance, by Transit Authority officers, with the constitutional requirement that the force employed in effecting an arrest be reasonable. To impose liability, plaintiff is required to demonstrate that agency standards are not, *at a minimum,* as restrictive as the

standards set forth in *Garner* so as to protect a suspect's Fourth Amendment rights.

By contrast, the claim based upon *respondeat superior* for an intentional tort committed by the Transit Authority's employee is governed entirely by State law concerning justification (Penal Law §35.30). Use of internal regulations in this context would unfairly place the agency in a paradoxical situation: to the extent that the agency sought to insulate itself from liability for Fourth Amendment violations by making its regulations even more stringent than the *Garner* standard, it would expose itself to greater liability in tort. Thus, as discussed below, agency regulations are not to be considered in connection with the issue of justification.

The potential for confusion in asking jurors to determine both legal and constitutional questions, governed by different legal standards requiring, in each instance, that agency regulations receive disparate treatment is obvious. The solution is, fortunately, equally obvious. The problem is obviated by a determination of the constitutional question as a threshold issue by the court, submitting to the jurors either the question of whether State justification criteria are met or, in the alternative, the question of whether the agency adopted a policy or custom which resulted in the deprivation of the suspect's rights (*Monell v. New York City Dept. of Social Servs.*, 426 US 658).

It would appear, moreover, that these two bases for recovery—Fourth Amendment and tort—are not only distinct, but also mutually exclusive. If an officer's actions are justifiable under a state law which is constitutional as applied to the facts of the case, then the only inquiry is whether the plaintiff has shown by a preponderance of the credible evidence that the circumstances did not justify the use of force pursuant to statute. If, however, the statute is not constitutional as applied to the facts of the case, then the

relevant inquiry is whether a policy or custom of the agency operated to deprive the plaintiff of rights secured by the Fourth Amendment.

The error committed in this case was the attempt to combine these two alternate grounds for liability, resulting in a hopelessly confusing charge affording the jurors no basis upon which to assess defendant's fault. As this court has stated, "where the error is so fundamental as to preclude consideration of the central issue upon which the claim of liability is founded, the court may, in the interests of justice, proceed to review the issue even in the absence of objection or request" (*Rivera v. Bronx-Lebanon Hosp. Center*, 70 AD2d 794, 796). Furthermore, while defense counsel may not have grasped the scope of the error or been able to articulate it with precision, his objections on the record are sufficient to preserve the issue for appellate review. The court's instructions are difficult to comprehend, and counsel may not be faulted for failing to perform, contemporaneously, an analysis of considerable complexity.

The threshold question to be addressed is whether the provisions of Penal Law §35.30 accord plaintiff the rights guaranteed him under the Fourth Amendment or whether the statute, as applied to the facts of this case, is unconstitutional. It bears emphasis that Penal Law §35.30(1) observes the criterion endorsed by the Supreme Court in *Garner* (*supra*), *viz.*, the danger which the suspect represents as suggested by either the immediate threat he poses to the officer or others or the violet nature of the crime for which his apprehension is sought. The statute provides: "1. A police officer or a peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he reasonably believes to have committed an offense, may use physical force when and to the extent he reasonably believes

such to be necessary to effect the arrest, or to prevent the escape from custody, or to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force; except that he may use *deadly physical force* for such purposes only when he reasonably believes that: (a) The offense committed by such person was : (i) a felony or an attempt to commit a *felony involving the use or attempted use or threatened imminent use of physical force* against a person; or (ii) kidnapping, arson, escape in the first degree, burglary in the first degree, or any attempt to commit such a crime; or (b) The offense committed or attempted by such person was a felony and that, in the course of resisting arrest therefor or attempting to escape from custody, such person is armed with a firearm or deadly weapon; or (c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the police officer or peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force" (emphasis added).

In applying the justification statute, the courts of this State have gone so far as to note that "there can be no cavil with the proposition that a citizen may use reasonable force in self-defense where the force exerted by the police in effecting an arrest is excessive. Nor can there by any doubt that force used by the police may reach such dimensions as to be illegal" (*People v. Stevenson*, 31 NY2d 108, 112 [citations omitted]; *see, People v. Robinson*, ____AD2d ____, 572 NYS2d 159, *appeal denied* 78 NY2d 1014). "It has been held that even if a policeman is in the lawful course of his duties, the use of excessive force would be a legal basis for a finding of assault (*Jones v. State of New York*, 33 NY2d 275; *Hinton v. City of New York*, 13 AD2d 475)" (*Stein v. State of New York*, 53 AD2d 988).

The gravamen of plaintiff's action, however it may be expressed in his complaint, is the intentional tort of assault and battery. There is no doubt that a battery was committed. Officer Rodriguez admittedly fired two bullets into the back of Bernard McCummings, as the IAS Court repeatedly reminded the jurors during the course of delivering its instructions. The only issues to be decided are whether the shooting was justified pursuant to State law and whether the statute, as applied to the facts at bar, is consistent with plaintiff's Fourth Amendment right to be free from unreasonable seizure (*Tennessee v. Garner, supra*). If the shooting was justified under State law, there is no basis upon which to hold defendant liable for the battery committed by its employee, Rodriguez (*Merzon v. County of Suffolk*, 767 F Supp at 448-449 *supra*; *Jones v. State, supra*, at 279). And, if the statute under color of which Rodriguez acted is consistent with the Fourth Amendment, there is no basis upon which to hold defendant liable for the violation of plaintiff's right to be free from the unreasonable seizure which the assault and battery is alleged to represent.

Whether the shooting is justified under State law is clearly a question for the trier of fact (*Jones v. State of New York, supra*, at 280). Whether the statute determinant of the justification issue is constitutional is just as clearly a question for the court which must be decided before the jury can be instructed on the law. In considering this question, "[i]t must be assumed that the Legislature intended to enact a statute which was in harmony with the United States Constitution and the Constitution of the State of New York" (*People v. Epton*, 19 NY2d 496, 505, *cert denied and appeal dismissed* 390 US 29). Furthermore, as a matter of policy, the courts of this State must "construe statutes in such a manner as to uphold their constitutionality" (*People v. Kaiser*, 21 NY2d 86, 103, *affd sub nom Kaiser v. New York*, 394

US 280, *reh denied* 394 US 1025). Therefore, irrespective of the course adopted by the Second Circuit Court of Appeals in *Heath v. Henning* (854 F2d 6, *supra*), this court does not have the discretion to ignore State law in favor of a broad constitutional standard which, as it applies to the facts of this matter, remains to be defined by case law.

In deciding whether Penal Law §35.30 is constitutional as applied to the facts of this case, the court must determine whether or not the use of deadly force against a suspect in immediate flight from the commission of "a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person" is reasonable in view of the Fourth Amendment considerations set forth in *Garner* (*supra*). As noted, the statute, insofar as it applies to the facts at bar, employs the criterion of dangerousness—as indicated by the violent nature of the felony committed or attempted—which was endorsed in *Garner* (*supra*) and the objective reasonableness standard which was applied in *Graham v. Connor* (490 US 386, *supra; Heath v. Henning, supra,* at 9). Therefore, the statute is philosophically consistent with controlling authority.

Of immediate concern in utilizing the statute as the basis for determining liability is whether, under the circumstances involved in this case, the statutory requirement that the felony involve the threat or use of "physical force against a person" is functionally equivalent to the requirement, stated in *Garner,* that the crime involve the potential "infliction of serious physical harm". While it is not readily apparent, a fair construction of Penal Law §35.30(1) (a) (i) is that, by employing the language "a felony involving * * * physical force" directed "against a person", the Legislature intended to designate a "violent felony offense". Every crime which is considered a violent felony is enumerated in Penal

Law §70.02(1). Nothing in *Garner* suggests that it is constitutionally unreasonable to regard someone who has committed one of the specified violent felony offenses as dangerous. Notably, one of the crimes listed is burglary involving the use of a weapon (Penal Law §140.30, burglary in the first degree), an offense which the United States Supreme Court specifically distinguished from the situation presented by the *Garner* case (471 US at 21, *supra*). However, as discussed earlier, the approach suggested by *Garner* is that each offense be evaluated *ad hoc*, under the circumstances of a particular suspect's apprehension (*Graham v. Connor*, 490 US at 396, *supra*).

In deciding *Garner*, the United States Supreme Court placed considerable emphasis upon the nature of the crime involved, as reflected in the classification of burglary by the F.B.I. as a "property" crime. In the instant matter, the statutory classification of robbery in the second degree as a violent felony offense (Penal Law §70.02[1][b]) is no less significant. The statute reflects the common law regarding robbery. As one court observed, "the rule followed in both England and the United States has been that the crime of robbery involves the taking of property by means of force or violence or by putting the victim in fear of suffering serious physical harm" (*Ryder v. City of Topeka*, 814, F2d 1412, 1419, n 17 [10th Cir 1987]). In *Ryder* (*supra*), which involved the shooting of an unarmed, 14-year-old girl by a police officer, the court determined that the shooting was justified based not on the type of crime, which the court found to be "non-violent" and "consensual" in nature, but on the fact that the officer reasonably believed the suspect to be armed and dangerous. The Tenth Circuit Court of Appeals noted that "theft lacks the threat of bodily harm or force that makes robbery such an inherently dangerous and violent crime" (814 F2d 1412, 1420). In the subsequent

case of *Ramos Ayala v. Diaz Martinez* (707 F Supp 75 [1988]), the United States District Court for the District of Puerto Rico dismissed a claim of the unjustified use of force by a police officer on the ground that the suspect was shot and killed while in immediate flight from the scene of a robbery which the court, citing *Ryder* (*supra*), characterized as "an inherently dangerous and violent crime" (707 F Supp 75, 77). The Court concluded, "Even if we draw the inference that decedent was unarmed, summary judgment would be appropriate" under *Garner* because of the violent nature of the crime (707 F Supp 75, 78).

Robbery is defined in Section 160.00 of the Penal Law as forcible stealing wherein the felon "uses or threatens the immediate use of physical force". It is recognized by the Legislature as a crime justifying the use of deadly physical force in the defense of a victim (Penal Law §35.15[2][b]). If, as the federal cases suggest, robbery is an inherently dangerous and violent crime, it is an offense which implicitly involved the threat of "serious physical harm", to use the terminology employed both in *Garner* (*supra*, at 11) and *Ryder* (*supra*, at 1419), justifying the use of deadly physical force to apprehend a robbery suspect. The courts of this State recognize robbery as a crime of innate violence and danger. "In considering what degree of physical force is sufficient to constitute a robbery, it should be borne in mind that the law of robbery, and indeed other forms of aggravated theft, developed 'to protect not only against misappropriation [of property] but also against injuries which may result from peculiarly dangerous means devised for accomplishing misappropriation' (Note, 54 Col L Rev 84). 'Regardless of the success of the misappropriation, aggravated theft is always accompanied by the possibility of physical or psychic injury to the victim' " (*People v. Santiago*, 62 AD2d 572, 579 [quoting, Note, 54 Col L Rev 184,

109], *affd* 48 NY2d 1023). Therefore, as applied to the apprehension of a robbery suspect by a police officer, Penal Law §35.30 is consistent with the Fourth Amendment criteria sent out in *Garner*.

If it may be said that the statute affords Fourth Amendment protection to robbery suspects in general, it certainly does not abrogate Fourth Amendment guarantees under the circumstances presented by the apprehension of Bernard McCummings. McCummings was in immediate flight from the commission of a violent felony to which Transit Officer Rodriquez responded. McCummings entered a negotiated plea of quilty to the attempt to commit the felony of robbery in the second degree. The victim was held in a choke hold and, according to his testimony, this was witnessed by the officer as he came upon the scene. The punching and choking of the victim constitutes the use of physical force as contemplated by the definition of second degree robbery (Penal Law §160.10[2][a]; *People v. Greene*, 70 NY2d 860, *rearg denied* 70 NY2d 951 [victim pushed to ground and held in choke hold]), a violent felony offense (Penal Law §70.02[1]), and by the definition of justification as it applies to the use of deadly physical force in making an arrest (Penal Law §35.30[1][a][i]). At the least, the force employed by the felons was sufficient, as a matter of law, to put the elderly victim in fear of sustaining "serious physical harm" (*Ryder v. City of Topeka, supra*, at 1419). In a statement given to police, Jacob Wise, one of plaintiff's accomplices, said, "I choked him and told him not to scream he started to scream and I choked him harder."

I am not aware of any case which has required an assessment of the constitutionality, pursuant to *Tennessee v. Garner* (*supra*), of a state law which justifies the use of deadly physical force against a fleeing felon based upon the violent nature of his crime (as opposed to the common-law distinc-

tion between felony and misdemeanor which *Garner* rejects). It is therefore understandable that the instructions given to the jury in this matter reflect a certain confusion regarding the applicable law. At the outset, the jurors were told, "Generally under the law it is held by the United States Supreme Court the use of deadly physical force by a police officer is unreasonable and unjustified if it is merely intended to prevent a felon from fleeing from a crime and who poses no immediate threat of serious physical injury or harm to an officer or others." This synopsis of *Garner* (*supra*) omits mention of the alternate ground justifying the use of deadly physical force provided by the violent nature of the crime involved. When the IAS Court did address this alternate ground of justification, the jurors were told that "a police officer may use deadly physical force to arrest or prevent the escape of a person from custody only when the officer reasonably believes that the person committed the felony or attempted to commit the felony involving the use or infliction or threatened eminent [*sic*] use or infliction of *serious* physical harm against another person. Provided the *level* of such deadly force used by the officer is reasonably believed by him to be necessary and not excessive to prevent an escape from custody and if where feasible some warning was [*sic*] given" (emphasis added). The court continued, "I might say serious physical injuries are defined under the Penal Law as an injury which creates a substantial risk of death or which causes death and protracted disfigurement or protractive [*sic*] impairment of health or protractive [*sic*] loss or impairment of a bodily organ or function." The latter instruction is the definition of "serious physical injury" found in Section 10.00(10) of the Penal Law. Defense counsel promptly registered his exception to the court's use of the statutory definition of "serious physical injury" (R 1673).

These instructions contain two substantive errors sufficient to require a new trial. First, the justification statute requires only that the felony committed involve the "use or attempted use or threatened imminent use of physical force against a person" (Penal Law §35.30[1][a][i]) and not "serious physical injury". While the United States Supreme Court provided no clarification of what was meant by "a crime involving the infliction or threatened infliction of serious physical harm" (*Tennessee v. Garner, supra*, at 11), it is patently unreasonable to assume that the Court had the New York definition of "serious physical injury" in mind when it employed the term "serious physical harm". A far more tenable construction is that the harm inflicted or threatened must be "substantial" (*Matter of Philip A.*, 49 NY2d 198, 200) and therefore within the statutory definition of "physical injury" (Penal Law §10.00[9]; *People v. McDowell*, 28 NY2d 373; *People v. Rodney*, 134 AD2d 463) and consistent with the common law concept of robbery as "the taking of property by means of force or violence or by putting the victim in fear of suffering serious physical harm" (*Ryder v. City of Topeka, supra*, at 1419; *People v. Greene, supra*). The choking and punching of the elderly victim was certainly sufficient force to put him in fear of sustaining serious physical harm, even though it resulted in no protracted impairment and may not have created any substantial risk of death.

The second substantive error in the instructions given to the jurors is the imposition of a requirement that the "level" of deadly force employed to capture McCummings had to be reasonably believed by the apprehending officer to be "necessary and not excessive". Both the Penal Law and *Tennessee v. Garner* (*supra*) speak only of deadly force and do not attempt to distinguish *levels* of deadly force. The jurors were therefore left to speculate as to what "level" of deadly

force might be reasonable under the circumstances and what might be excessive. However, the giving of a warning to the suspect, when feasible, is material to a consideration of whether the apprehending officer reasonably believed the use of deadly force to be necessary, and there is no inconsistency in *Garner* and State law in this regard.

The jurors were clearly confused by the court's charge regarding justification because reinstruction was requested, at which time defense counsel renewed his objection to the charge (R 1918). The court, however, simply directed the court reporter to read back its previous instructions on the subject.

During the pre-charge conference, the court indicated to counsel that it considered Penal Law §35.30 and *Garner* (*supra*) to be in harmony stating, "I still believe that *Garner* is consistent with the statute," (R 1712) and, "As to *Garner* and 35.30 [they] are the same and they a[r]e consistent" (R 1714). Yet, the court departed from the language of the statute and engrafted onto it the requirement that the subject felony involve "serious physical injury", as defined in Penal Law §10.00(10). Thus, "necessarily implied in the decision" is a finding, *sub silentio*, that the statute as written fails to accord plaintiff the Fourth Amendment rights delineated in *Garner* (*supra*), a finding which constitutes an independent basis for this court's appellate review (CPLR 5701[a][2][vii]).

That the victim in this case did not sustain serious physical injury is not dispositive, contrary to the instructions given to the juror, but merely fortuitous. (The victim was treated for abrasions to the face and head.) Violence is a slippery path, and the criminal who embarks upon it cannot be sure how far down it he may slide. The harm which is actually inflicted during a robbery attempt may be tragically different from that which was intended by the assailant

(*People v. Santiago, supra,* 62 AD2d 572, *affd* 48 NY2d 1023 [purse snatching victim crushed to death by subway car]; *People v. Sanders,* ____AD2d____, 570 NYS2d 23, *appeal denied* 78 NY2d 1014 [victim, pushed to ground during attempted robbery striking head on pavement, dies from injury]) or from the consequences which might logically be expected to result from the intended nature of criminal conduct directed against an elderly or infirm victim (*People v. Ingram,* 67 NY2d 897 [victim of apparent burglary attempt suffers myocardial infarction and expires]). The extent of the injury which might have been inflicted had Transit Officers Rodriguez and Mead not been present to intervene cannot be surmised. It is perhaps because of an appreciation of the practical difficulty in containing the extent of injury which follows from the felon's resort to force which led the Legislature to authorize the use of deadly force against a suspect for the use of "physical force" (Penal Law §35.30[1][a][i])—as opposed to the infliction of some specified severity of injury (*see,* Penal Law §10.00[9];[10])—during the commission of a felony.

The jury was also erroneously instructed to consider defendant Transit Authority's regulations governing the use of deadly force. In objecting to the court's proposal to permit consideration of these regulations by the jurors during deliberation (R 1687-1693), defense counsel pointed out, quite correctly, that "the justifiableness of a shooting can only be judged by legal standards" (R 1689). This action must be distinguished from cases in which an officer commits an act of recklessness resulting in injury to a bystander during the course of an otherwise justified shooting, for which the officer remains liable by express statutory provision (Penal Law §35.30[2]; *See, e.g., Shaw v. Manufacturers Hanover Trust Co.,* 95 AD2d 738). It must be emphasized that this is not a negligence case where the parties are free to

stipulate as to the standard of conduct which is appropriate under the circumstances. This matter involves an intentional tort which is either justified or not justified under State law, and defense counsel so advised the court (R 1689-1690). The standard with respect to justification which applies to this case is set forth in Penal Law §35.30 (*Merzon v. County of Suffolk*, 767 F Supp at 448-449, *supra; Cook v. City of New York*, 82 AD2d 72, 75-76), and any question regarding the interpretation of that statute is a question of law for the court.

Mere administrative regulations may not be placed on an equal footing with a statute so as to compromise the intent of the Legislature in enacting it (*Georgiou v. State of New York*, 28 AD2d 1027, *lv den* 21 NY2d 641). As this court recently stated in *Clark v. New York City Transit Auth.*(____AD2d____, 1992 NY App Div Lexis 874), "internal rules * * * are not admissible when they impose a standard higher than that otherwise set by law" (citing *Rivera v. New York City Transit Auth.*, 27 NY2d 322, 329; *Crosland v. New York City Transit Auth.*, 68 NY2d 165, 168-169). While defendant's regulations were properly admitted into evidence in connection with plaintiff's action for negligent training and supervision, they ceased to have any relevance to this case as soon as the negligence cause of action was dismissed. Defense counsel advanced precisely this argument upon renewing his objection to the use of defendant's regulations by the jurors during deliberations (R 1908-1910). (As noted above, if Supreme Court's *sub silentio* ruling that Penal Law §35.30 is unconstitutional as applied to the facts of this case were proper, the regulations would then be relevant to the jurors' consideration of whether any policy or custom adopted by the Transit Authority Police Department resulted in the deprivation of plaintiff's constitutional rights, as required for liability in

Monell v. New York City Dept. of Social Servs. [436 US 658, *supra*].)

In light of the numerous objections raised by defense counsel to proposed instructions and his timely exception to numerous elements of the charge delivered by the court, as well as the court's implicit ruling that Penal Law §35.30 is not constitutional as applied to the facts of this case by virtue of its failure to mention "serious physical harm" (however that term should be construed), there can be no doubt that the issue raised upon this appeal has been preserved for review. Having asserted in timely fashion, during the pre-charge conference and again upon the jurors' request for reinstruction on the law of justification, that this issue is governed by Penal Law §35.30, defense counsel put the court on notice as to the existence of a controlling statute asserted to be dispositive of the issue presented (*see, Arbegast v. Board of Educ. of S. New Berlin Cent. School*, 65 NY2d 161, 163 n 1). Defendant has done all that is required to preserve for review the question of whether the statute is the standard by which the reasonableness and lawfulness of Transit Officer Rodriguez's shooting of plaintiff McCummings is to be determined. Defense counsel was not required to advance any argument in favor of the statute's constitutionality: a presumption to that effect operates in his favor, and the burden falls upon plaintiff's counsel to rebut the presumption (McKinney's Statutes §150[b]).

The United States Supreme Court's opinion in *Tennessee v. Garner* (*supra*), requires the courts of this nation to take a reasonable approach regarding the seizure of felony suspects based upon the danger which they represent (reflected, in this instance, by the violence of the pertinent crime). The opinion makes clear that police officers—and the courts—must distinguish between suspects who, by their acts, constitute no danger and those who have demonstrated a capac-

ity for violent assaultive behavior. "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of ' "the nature and quality of the intrusion on the individual's Fourth Amendment interests" ' against the countervailing governmental interests at stake" (*Graham v. Connor,* 490 US 386, 396). A balancing of the State's interest in effective law enforcement, including the apprehension of suspects, and the felon's interest in being free from unreasonable seizure does not require that officers refrain from employing their weapons to prevent escape in every instance (*see, Tennessee v. Garner,* 471 US at 11, *supra*).

Accordingly, the judgment of the Supreme Court, New York County (Leonard Cohen, J.), entered March 8, 1990, upon a jury verdict in favor of plaintiff in the amount of $4,343,721.24, and the order of the same court, entered May 14, 1990, denying defendant's motion to set aside the jury verdict, should be reversed, on the law, without costs, and the matter remanded to Supreme Court for a new trial on the question of whether the shooting of plaintiff was justified pursuant to Penal Law §35.30.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: February 20, 1992

CATHERINE O'HAGAN WOLFE
Deputy Clerk

APPENDIX C—Order of New York State Court of Appeals (April 5, 199[illegible]

Remittitur

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Judith S. Kaye, Chief Judge, Presiding

1 No. 32

BERNARD MCCUMMINGS,

Respondent,

v.

NEW YORK CITY TRANSIT AUTHORITY,

Appellant.

The appellant in the above entitled appeal appeared by Albert C. Cosenza, Esq., Counsel, New York City Transit Authority; the respondent appeared by David Breitbart, Esq.

The Court, after due deliberation, orders and adjudges that the order, insofar as it affirmed the judgment of Supreme Court, is affirmed, with costs, in a memorandum.

Appeal, insofar as taken from that portion of the Appellate Division order which affirmed the order of Supreme Court denying defendant's post-judgment motion to vacate and set aside the verdict and judgment, is dismissed upon the ground that that portion of the order does not finally determine the action within the meaning of the Constitution. Chief Judge Kaye and Judges Simons, Hancock and Smith concur. Judge Titone dissents in part and votes to dismiss the appeal in part and reverse in part in an opinion. Judge Bellacosa separately dissents in part and votes to dismiss the appeal in part and reverse in part in an opinion.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

DONALD M. SHERAW
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, April 5, 1993.

APPENDIX D—Order of Denial of New York State Court of Appeals (July 8, 1993).

COURT OF APPEALS,

STATE OF NEW YORK.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth day of July 1993

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

Mo. No. 541

BERNARD MCCUMMINGS,

Respondent,

v.

NEW YORK CITY TRANSIT AUTHORITY,

Appellant.

A motion for reargument to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

DONALD M. SHERAW
Clerk of the Court

APPENDIX E—Judgment of the New York State Supreme Court, County of New York (March 8, 1990).

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

TRIAL TERM PART 23
JUSTICE COHEN

BERNARD MCCUMMINGS,

Plaintiff,

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

Index No. 9494/85

This matter having been tried with a jury before the Hon. Leonard N. Cohen on and between January 23, 1990 and March 6, 1990, and the Court and Jury having heard testimony and received evidence, and due deliberation having been had thereon, and the Jury having found in favor of the plaintiff on March 6, 1990.

NOW, upon motion of David Breitbart, 60 Hudson Street, New York, N.Y., attorney for plaintiff, Bernard McCummings, it is hereby

ADJUDGED, that plaintiff Bernard McCummings, who resides at West 126th Street, New York, N.Y., shall recover against defendant New York City Transit Authority, whose place of business is 370 Jay Street, Brooklyn, New York, the sum of $4,342,142.55 with interest from March 6, 1990, in the sum of $723.69 together with costs and disbursements in the sum of $855.00, making a total of $4,343,721.24 and that said plaintiff shall have execution thereof.

Dated: New York, N. Y.
March 8, 1990.

NORMAN GOODMAN
Clerk

FILED

MAR 8 1990

COUNTY CLERK'S OFFICE
NEW YORK

APPENDIX F—Excerpts From Plaintiff's Trial Memorandum.

(2073) SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

BERNARD MCCUMMINGS,

Plaintiff,

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

Index No. 9494/85
Calendar No. 87L02533

PLAINTIFF'S TRIAL MEMORANDUM

STATEMENT OF THE CASE

This is an action to recover money damages arising from personal injuries sustained by the plaintiff, Bernard McCummings, as a result of having been shot twice in the back by a police officer employed by the New York City Transit Authority upon fleeing from the scene of a robbery on June 28, 1984. The shooting took place at approximately 8:00

P.M. at the 96th Street IND Subway Station at the Northeast side of the southbound platform stairs. The defendant Bernard McCummings, acting in concert with two others, Jacob Wise and Nathan Woods, were in the act of robbing a person who had entered the 96th Street Subway Station at 97th Street and was descending the subway stairs on his way to the southbound platform at said subway station. Police Officer Manuel Rodriguez and his partner, Christine Meade, came upon the scene of the robbery Officer Rodriguez claiming that the perpetrators "lunged" at him, fired five shots at McCummings and Wise, both of whom were in fact fleeing in an (2074) effort to avoid arrest. One of the bullets struck McCummings in the center region at the spine in the mid chest/back area causing immediate paralysis. It is the plaintiff's claim that the shooting was totally without justification and in violation of his Fourth Amendment rights under the United States Constitution.

(2075) FACTS OF THE CASE

On July 28, 1984 at approximately 8:00 P.M. the plaintiff Bernard McCummings, together with two of his companions, Jacob Wise and Nathan Woods, acted together in the commission of a robbery. The robbery took place at the 96th Street IND Subway Station at the AA Line at the Northeast side of the southbound stairwell leading to the southbound subway platform. The robbery victim, identified by the Transit Authority Police as Jerome Sandusky, was entering the 96th Street IND Subway Station at 97th Street and Central Park West.

After entering through the turnstiles, Sandusky proceeded down the subway stairs passing as Nathan Woods, who was acting as a lookout for McCummings and Wise. Upon reaching the landing, Sandusky was accosted by McCummings

and Wise. Wise began to choke Sandusky while McCummings went through his pockets.

According to the Transit Authority, Police Officer Manuel Rodriguez, Shield # 757465 and his partner, Police Officer Christine Meade Shield # 2871, came down the stairs and, at the bottom of the landing, observed a robbery in progress. Officer Rodriguez, followed by Officer Meade, having heard screams coming from the bottom of the steps, proceeded down this flight of stairs with weapons drawn. Upon observing the robbery, Officer Rodriguez allegedly displayed his shield which he keeps on a chain around his neck, identified himself as a police officer and (2076) stated, ". . . in a loud and clear voice 'Police don't move'." Officer Rodriguez further claims that after shouting "Police don't move", the perpetrators "lunged" at him at which time he shot five shots in their direction. One bullet struck Wise in the right hand. Two bullets struck McCummings in the back. There is an entry wound below the left shoulder blade and another entry wound in the center region at the spine in the mid chest/back area. Rodriguez further alleges that after shooting McCummings, he attempted to flee the scene, ran down the stairwell towards the subway platform and collapsed at the bottom of the stairs. The distance between the location at the landing where Rodriguez claims that McCummings and Wise "lunged" at him and the location at the bottom of the stairs where McCummings collapsed, is approximately fifteen feet. It is thus the Transit Authority's contention that McCummings, having been shot in the spine, managed to run a distance of fifteen feet before collapsing.

Captain John Kelly of the Transit Authority Police Department investigated the facts and circumstances surrounding the robbery and shooting. In a report dated June 28, 1984, Captain Kelly issued his report to the Chief of the

Transit Police. His report fully supports the contention by Rodriguez that he shot McCummings while he and Woods lunged at him. The report states "Both culprits somewhat simultaneous(ly) lunged at the officer at which time he fired five rounds." The Kelly (2077) report also states that Officer Meade claims that at the time of the shooting, she was standing behind Rodriguez and was unable to view the robbery scene. Therefore she cannot support the contention of Rodriguez that the perpetrators "lunged" in his direction before he shot at them.

In a followup report prepared by Captain Kelly dated July 1, 1984, Kelly speculates as to how it is possible that McCummings could have lunged at Rodriguez and have sustained two bullet wounds to his back. The report states: "With regard the culprit being hit on the spine, it is only opinion at best, since no one including the officer could clarify. The culprit sustained a bullet graze to his lower right side which may have spun him around, causing another round to (hit) his spine. There is no independent witness as it is an isolated landing." Obviously, Captain Kelly is troubled by the evidence in this case. The back injuries to McCummings are simply not consistent with the Rodriguez version of the shooting.

McCUMMINGS' VERSION OF THE SHOOTING

Bernard McCummings admits that he, acting in concert with Jacob Wise and Nathan Woods were caught in the act of robbing Jerome Sandusky as described by the Transit Authority Police Department. He further admits that on October 29, 1984, he pled guilty to the crime of attempted robbery in the second degree in that he, while acting in concert with two others, (Wise and Woods) robbed Jerome Sandusky at 8:00 P.M. on June 28, 1984. (2078) No

weapons were used by any of the perpetrators in the commission of the robbery. Nor do the police claim that a weapon was used by any perpetrator. Physical, medical and eye witness evidence support the contention that when the police came upon the scene, McCummings and Wise attempted to flee from them by running down the stairs. McCummings denies lunging at Rodriguez. When the bullet struck his spine, McCummings collapsed immediately. Richard Radna, M.D. in a report dated November 7, 1989, concludes that it is his impression that, within a reasonable degree of medical certainty, McCummings was rendered weak in the bilateral lower extremities immediately following the gunshot wound to his spine which precluded him from standing, walking, or running. That being the case, how could McCummings have run a distance of about fifteen feet before collapsing? Fifteen feet being the approximate distance from the location where Rodriguez claims to have fired and where McCummings collapsed. Thus it is apparent that the shooting took place while McCummings attempted to flee the scene of the robbery and not while "lunging" at Rodriguez.

The McCummings claim that he was shot in the back while attempting to flee from the scene of the robbery is further supported by Jerome Sandusky, the robbery victim. In a letter dated July 9, 1984, addressed to the Chief of the Transit Police, Sandusky states "In the middle of this situation (the robbery) he (Rodriguez) intervened by saving me and shooting two of the men *as they attempted to escape from him.*" (emphasis added).

(2079) THE APPLICABLE LAW

The plaintiff in this action complains that the Transit Police Department, through its agent, Police Officer Manuel Rodriguez, violated his Fourth Amendment rights in using deadly physical force to apprehend him while fleeing from the commission of a felony. As previously stated, the plaintiff admits that he was in the act of committing a robbery when Officers Rodriguez and Meade came upon the scene. However, neither the plaintiff nor his accomplice were armed during the commission of the crime, nor during their attempt to flee, nor did they pose a significant threat of harm to this police or a third party. Thus, Officer Rodriguez used deadly force under circumstances where such force is not permissible.

The controlling case in situations involving the use of deadly force to apprehend unarmed fleeing felons is *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694 (1985). In *Garner,* those provisions of the Tennessee statute declared unconstitutional by the United States Supreme Court, authorized the use of deadly force against an unarmed, nondangerous fleeing suspect in order to prevent his escape. The Court, in striking down portions of the Tennessee statute, determined that apprehension by use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement.

The facts in *Garner* are that on October 3, 1974, a police officer of the Memphis Police Department shot a fleeing burglary suspect. The police, coming upon the scene of a burglary, and (2080) observing the suspect shouted, "Police, halt." In an effort to escape apprehension, Garner began to climb over a fence. Convinced that if Garner managed to get passed the fence, that he would elude capture, the Officer shot him. The bullet struck Garner in the back of the head killing him. The action was brought by the

victim's father, seeking damages under 42 U.S.C. Sec. 1983 for violation of Garner's constitutional rights. The Court held that:

1) apprehension by use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement; and

2) deadly force may not be used unless it is necessary to prevent the escape *and* the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others; and

3) the Tennessee statute which permits a police officer to fire upon a fleeing suspect is unconstitutional insofar as it authorizes the use of deadly force against apparently unarmed, nondangerous fleeing suspects.

The issue of retroactivity of *Garner* was determined by the Second Circuit Court of Appeals in *Davis v. Little*, 851 F.2d 605 (2d Cir. 1988). In *Davis*, a police officer employed by the Waterbury Connecticut Police Department, shot Robert Davis, causing serious physical injury. At the time that Davis was shot, the Officer knew that Davis was an escaped felon who was in (2081) flight from the custody of a fellow police officer; that Davis was unarmed, and that Davis had made no threat to use deadly force against any police officer or third party. Thus, deadly force was used for the sole purpose of thwarting the escape of a fleeing felon.

Under the facts as indicating above, the Court ruled that deadly force violated Davis' Fourth Amendment rights. The defendant contended that the Court erred in applying the *Garner* rule to police activity which occurred years before the decision was rendered. Particularly in light of a Con-

necticut statute in force at the time of the shooting which appeared to permit the use of deadly force to justify the shooting under the facts of *Davis*. In rejecting this argument, the Court determined that *Garner* was not an entirely new and unanticipated principle of law and consequently, should be applied retroactively to events which predate *Gardner*. The Court further stated that almost every other Circuit which considered the retroactivity of *Garner* applied its holding retroactively.

In *Heath v. Henning*, 854 F.2d 6 (2d Cir. 1988), the Court applied the *Garner* Fourth Amendment analysis retroactively in a case involving the apprehension of a fleeing robbery suspect who was shot by police. The police admitted that at the time of the shooting they saw no weapons in the plaintiff's hands. The *Heath* Court opined (at page 9):

> (2082) "The consideration of such subjective factors (proof that the officers acted with malice) is inconsistent with the Fourth Amendment balancing test articulated in *Garner*. The proper standard requires that a jury consider whether the officers acted reasonably, under the totality of the circumstances, in using deadly force to effect the arrest . . . While the Fourth Amendment test does take into account the officer's knowledge, e.g., whether an officer is aware that the suspect is armed or dangerous, or knows whether the alleged felony involved violence, its primary focus is on the attendant circumstances and the objective reasonableness of the officer's actions."

APPENDIX G—Excerpts From Plaintiff's Request to Charge.

(2085) SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

BERNARD MCCUMMINGS,

Plaintiff,

against

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

Index No. 9494/85

Plaintiff Bernard McCummings requests that the following jury charges be given by the Court to the Jury on this matter:

1. PJI 1:22.

2. Apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment of the United States Constitution. *Tennessee v. Garner,* 105 S.Ct. 1694 (1985) (at p. 1699) 471 U.S. 1, *Davis v. Little,* 854 F. 2d 605 (2d Cir. 1988), *Heath v. Henning,* 854 F. 2d 6 (2nd Cir. 1988).

3. Reasonableness is to be determined by balancing the infringement of the individual's interest caused by the police action against the Governmental interest served by that action. *Martin v. Malhoyt*, 830 F.2d 237, 261 (D.C. Cir. 1987), *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642 (1983).

4. The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from (2086) failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. The New York Statute, Penal Law Section 35.30, is unconstitutional insofar as it may be interpreted to authorize the use of deadly force against such fleeing suspects.

It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical injury, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical injury, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. As applied in such circumstances, the New York Statute would pass constitutional muster. *Tennessee v. Garner, supra,* (at p.1701), *Davis v. Little, supra, Heath v. Henning, supra.*

5. "Serious physical injury" is defined by Section 10.00 of the Penal Law as "10. 'Serious physical injury' means injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, pro-

tracted impairment of health or protracted loss or impairment of the function of any bodily organ."

(2087) 6. If you find that Police Officer Rodriguez shot Bernard McCummings as he and Wise lunged at Officer Rodriguez thereby putting him in imminent fear of death or serious physical injury then you must find in favor of the defendant, The New York City Transit Authority. If on the other hand, if you find that Police Officer Rodriguez fired his weapon at Bernard McCummings while he was fleeing after having committed a robbery and that one of the bullets struck him in the spine at the bottom of the steps (PL 6) and that he was unarmed and posed no significant threat of death or serious physical injury to either Police Officers Rodriguez, or Meade or to a third person, then you must find in favor of the plaintiff.

7. If you find that the defendant's claim that it shot the plaintiff, Bernard McCummings because he and Wise lunged at P.O. Rodriguez, thereby putting him in imminent fear of death or serious physical injury is not supported by the evidence in this case, but rather was a cover-up story designed to justify an improper shooting, you may find that such false claim was offered as a result of consciousness of guilt on the part of the defendant, NYCTA, and you may infer that this was a shooting outside the standards of propriety. *People v. Haitz*, 411 N.Y.S.2d 57 (4th Dept. 1978), *People v. Griffin*, 511 N.Y.S.2d 136 (2d Dept. 1987).

* * *

APPENDIX H—Colloquy During Trial.

(700) MR. KUZMACK: In *Garner,* which plaintiff alleges is controlling, and I agree with him to the extent that the case law is controlling in this instance, in *Garner* the Court says:

"Thus if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime (701) involving the infliction or threatened infliction of serious physical harm, deadly force may be used, if necessary, to prevent escape and if where feasible some warning has been given."

I would submit that under the Penal Law or under *Tennessee versus Garner,* your Honor, whether the Court or the jury believes the plaintiff's story or the officer's version, it's immaterial, and that at the end of the case we will ask for a directed verdict on this and I will make a proper motion at that time.

* * *

(702) MR. SIERADZKI: Number two, we believe that counsel has (703) misinterpreted *Tennessee against Garner. Tennessee against Garner* which is a 1985 U.S. Supreme Court decision struck down that portion of a *Tennessee* statute which permitted police officers to use deadly physical force in the apprehension of unarmed fleeing felons. Our argument, that is exactly what we have here, an unarmed fleeing felon. And in striking down that statute the Supreme Court held, number one, that the apprehension by use of deadly physical force is subject to the Fourth Amendment reasonableness requirement.

Number two, that deadly physical force may not be used unless it is necessary to prevent the escape, and the officer

has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

Under the plaintiff's contention of the facts of this case—

THE COURT: How do you reconcile that with 35.30 as Mr. Kuzmack just stated?

MR. SIERADZKI: 35.30 is not applicable. We are going to argue that *Tennessee* (704) *versus Garner,* which has retroactive effect, is applicable and under the *Tennessee versus Garner* standard you may not use deadly physical force to apprehend an unarmed fleeing felon, that is what the U.S. Supreme Court said.

And it was further interpreted in two Second Circuit Court of Appeals decisions right here in the Second Circuit. One is *Health against Henning,* 854 F 2d at page 6, which as I indicated is a Second Circuit decision 1988. *Heath against Henning* ruled that the *Tennessee against Garner* decision is retroactive, has retroactive effect.

* * *

(706) MR. BREITBART: The Supreme Court of the United States in that case ruled that any statute that permits anyone to shoot a fleeing felon that is unarmed is unconstitutional and not enforced in this country.

THE COURT: 35.30 would be unconstitutional to that extent.

APPENDIX I—Excerpts From Charge Conference.

(1661) MR. KUZMACK: For the record, I would renew my motion for a directed verdict at the end of the defendant's case and ask the Court to look at the memo I submitted at the end of the plaintiff's case, keeping in mind that the standard at this point changes and that all the evidence does not have to be taken in light most favorable to the plaintiff, which, I submit, just in short, whether the Court believes that the plaintiff was shot while lunging at the officer and that the officer was reasonable to believe he was in fear of his life or that deadly physical force was being used against him, or whether he was shot escaping; that, under the laws as it stands (1662) on the 3530 and under *Tennessee v. Garner,* that because it was a violent felony that was committed either way.

THE COURT: I realize that has been your contention. The reading of *Garner,* certainly of the paragraph on page 1701, that your position is even if he was shot in the back while fleeing down the stairway, that, therefore, your position is that even under *Garner,* it was a justifiable shooting.

MR. KUZMACK: I would renew the motion at this time.

THE COURT: If that were the case, there would be no trial. I think that position was asserted after plaintiff's prima facie case.

MR. KUZMACK: Yes, it was, your Honor.

THE COURT: I will deny your motion. I do not believe that is the law. That is my opinion. I may be wrong on it, but I don't believe that is precisely what the law is as applied to the facts in this case, and I will deny the motion.

* * *

(1667) I will charge that the Supreme Court has held that the use of deadly force, generally, against a felon who is fleeing from a crime is—I think the *Garner* decision states that it is unreasonable under the law—then I will go on to state what (1668) the law is in the *Garner* decision, which governs this case, as does Penal Law 3530—that if a suspect or any person who commits any offense threatened the officer with the weapon or deadly weapon or any—or otherwise with imminent physical force, serious physical force, that the use of deadly force is justified—or that if the use of deadly force is justified, if the police officer reasonably believes that a felon has committed a crime involving the infliction or threatened infliction of serious physical harm, and that the officer reasonably believes that such level of deadly force is necessary to prevent an escape from custody, and where feasible, a warning is given—that, generally, is what I would be charging and would be charging also because that's expressed in 3530—I think the same thing is expressed in 3530.

* * *

(1679) THE COURT: I would be reading the guidelines probably before. I will be reading the guidelines, and I'll be reading 3530 as well as *Garner* before then.

* * *

(1680) THE COURT: I will charge them as to *Garner* and P.L. 3530.

MR. BREITBART: And then the guidelines?

THE COURT: As well as *Garner*—and I've read it already, on the record. I don't want to repeat it—except, I will state that one of the justifications for the use of deadly force under 3530—I have to repeat it—is if the offense is (1681) a felony or an attempt to commit a felony involving the use or

attempted use or threatened imminent use of physical force against a person, deadly force is justified.

I have added the scenario that assuming they disbelieve Rodriguez and they believe the plaintiff, that he ended up at the bottom of the stairs and was shot in the back, that in that event, that the officer also has to have a reasonable belief that such level of force was necessary.

* * *

(1687) THE COURT: Well, I will be charging the use of deadly force. I will be charging it with respect to 3530, because it pinpoints it, right on the button.

I will be charging *Garner*, which pinpoints it right on the button—and also the guidelines.

* * *

(1712) THE COURT: No, I am going to read in substance the combination of the Supreme Court decision and the statute because I think they basically are the same.

MR. BREITBART: Well they are not for this reason and this is the problem that we went over last night and this morning. As you are very well aware the decision in *Garner* condemning the shooting of a burglar making unconstitutional a statute that permitted such shooting, nothing has been done with the New York statute since *Garner* or since 1984. The New York statute does include burglary as a justifiable shooting even though *Garner* precludes it under the law.

I would ask you to look at 3530 subdivision—

THE COURT: Well assuming that is true, I still believe that *Garner* is consistent with the statute.

MR. BREITBART: with 3530?

THE COURT: Yes. With respect to the use of the—again with respect to two things. One, the use of deadly force where an officer (1713) reasonably believes that he is being faced with a serious physical harm or danger or threat to his life to defend himself. With respect to any offense whether it was a felony or any offense in that event he has the right, it is justifiably to use deadly force either under *Garner* or under the statute.

MR. BREITBART: No argument.

THE COURT: The only other instance in terms of the facts in this case is that is whether a police officer can use deadly force when he—if he reasonably believes that a violent felony or forcible felony has been committed or is threatened to be committed and it is—and he—and it is reasonable for him to believe that it is necessary to use that level of deadly force based upon the circumstances confronting the police officer at the time of the incident both under *Garner* and under 3530, it is the same.

It can be justified. Or if it is unreasonable for the officer to believe that a crime, whether it is a violent felony crime has been committed or is threatened to be committed (1714) or even if you believed that or even if they should find that the police officer should reasonably or should have reasonably believed or did reasonably believe that a violent felony had been committed or was threatened to be committed then the issue is whether or not a police officer reasonably believed that the level of force such as deadly force was necessary and a warning if feasible was given. Based upon the circumstances confronting the officer.

MR. BREITBART: That we understand.

THE COURT: As to *Garner* and 3530 are the same and they are consistent.

MR. BREITBART: They are not consistent, Judge—

THE COURT: I will charge that way.

* * *

(1716) MR. BREITBART: Are you going to describe the guidelines as a standard of care and the violation of the guidelines is negligence?

THE COURT: No.

MR. BREITBART: That is the law.

THE COURT: I will not so charge. I am not charging negligence in this case. I am charging basically whether or not the use of deadly force, deadly physical force was justified or unjustified and the plaintiff has the burden of proof of establishing the lack of justification.

* * *

APPENDIX J—Excerpts From Charge to Jury.

(1889) As I stated before there is no dispute that the plaintiff committed the felony crime of robbery on June 28, 1984 which involved the use of serious physical harm and force against Jerome Sandusky. It is also undisputed that neither the plaintiff or other criminal defendants were unarmed with a gun or even appeared to have such weapons and in addition to that Police Officer Rodriguez acted within the scope of his official duties as an officer of the Transit Authority in using deadly force and as I say the use of the force was a proximate cause of the personal injuries to the plaintiff. There is no dispute about that.

What is in dispute is whether Police Officer Rodriguez in using deadly force against the plaintiff acted unjustifiably as plaintiff claims or justifiably as defendant contends (1890) on June 28, 1984.

Now your verdict as to this issue depends upon the law as it applies to the use of deadly physical force by a police officer. Under the totality of the circumstances of which you find confronted the officer immediately before at the time of his firing of the revolver. Generally under the law it is held by the United States Supreme Court the use of deadly physical force by a police officer is unreasonable and unjustified if it is merely intended to prevent a felon from fleeing from a crime and who poses no immediate threat of serious physical injury or harm to an officer or others.

However, in this case under the law as held by the United States Supreme Court decision and under the New York State Penal Law, Section 35.30 a police officer may use deadly force to prevent the escape of any criminal offender or suspect if the police officer reasonably believes that a person committed or attempted to commit any type of criminal offense felony or otherwise but the suspect is armed

with a firearm or a deadly weapon or it is necessary (1891) for the police officer to defend itself or herself or another person from what the police officer reasonably believes to be the use or imminent use of deadly physical force or from the threat of serious physical harm against him or her as a police officer or another person. Such use of deadly force by a police officer under those circumstances would be justified under the law.

Therefore if you believe the defendants evidence and the testimony of Police Officer Rodriguez that he reasonably believed that the plaintiff committed or attempted to commit a felony of forcible robbery and that the plaintiff and another felony offender, Wise, lunged at him on the landing between PL5 and PL6 and the Police Officer Rodriguez reasonably believed that the plaintiff posed a threat of imminent use of deadly physical force, of serious physical harm to him or others and that the plaintiff after being shot on the landing ran down the PL6 stairway then the officer's use of deadly force was reasonable and necessary to prevent plaintiff's escape (1892) from custody and for the police officer to defend himself from such deadly physical force and such deadly force used by a police officer would be justified and you would bring in a verdict for the defendant.

However, if you disbelieve the defendant's evidence and disbelieve the testimony of Police Officer Rodriguez that—in that the testimony of Rodriguez that he reasonably believed the plaintiff had committed or attempted to commit a felony or forcible robbery and you find as plaintiff claims that neither the plaintiffs nor the other offender Wise actually lunged at the police officer on the landing and that neither of the perpetrators posed any imminent threat of deadly physical force or serious physical harm to the officer then you will next consider if Police Officer Rodriguez's use of deadly force was unjustified or justified.

If you find that the plaintiff has sustained his burden of proof as to his claim and find that Rodriguez did not have a reasonable belief that a felony of robbery, forcible robbery involving physical harm to Sandusky had been (1893) committed or threatened or even if the police officer did have such a reasonable belief or even observed the crime in progress, that the police officer used deadly physical force in preventing the escape of the unarmed plaintiff as a felon of a forcible robbery by shooting the plaintiff in his back when plaintiff was at the bottom of PL6 stairway after running down that stairway and fleeing from the crime scene then you will next consider the law which applies as to this finding. In other words what I am saying is if you believe the plaintiff's claim you will then consider the penal law of the State of New York and the United States Supreme Court decision which applies to that finding.

Under that law a police officer may use deadly physical force to arrest or prevent the escape of a person from custody only when the officer reasonably believes that the person committed the felony or attempted to commit the felony involving the use or infliction or threatened imminent use or infliction of serious physical harm against another person. (1894) Provided the level of such deadly force used by the officer is reasonably believed by him to be necessary and not excessive to prevent an escape from custody and if where feasible some warning has given.

In the event you believe the plaintiff's claim of how and where the deadly force was used from all of the evidence whether or not Police Officer Rodriguez reasonably believed that the plaintiff had committed or attempted to commit a forcible and violent felony and if so whether or not his—it is for you to determine that and if so, whether or not his use of deadly physical force was reasonably believed by him as a police officer to be necessary to prevent plain-

tiff's escape from custody and it is for you to decide if he gave such sufficient warning where feasible under all of the circumstances that confronted Police Officer Rodriguez immediately prior to and the time of his use of deadly force.

I might say serious physical injuries are defined under the Penal Law as an injury which creates a substantial risk of death or (1895) which causes death or serious and protracted disfigurement or protractive impairment of health of protractive loss or impairment of a bodily organ or function.

Therefore, if you find that the plaintiff has sustained his burden of proof that Police Officer Rodriguez did not observe the crime of a forcible robbery in progress or did not reasonably believe that a violent felony had been committed or was attempted to be committed prior to the shooting then under the law the police officer may not use deadly force and if he does use deadly force and if he does use deadly force sufficient—such force would be unjustifiable.

However if you find that the Police Officer Rodriguez observed the violent robbery and felony in progress or reasonably believed that a violent felony had been committed or was attempted to be committed prior to shooting then you will next consider if the police officer reasonably believed that the use of deadly physical force was necessary of shooting the plaintiff in the back at the bottom of PL6 to prevent the plaintiff's escape and if a (1896) feasible warning was given if you find that Police Officer Rodriguez reasonably believed that the level or extent of his using deadly force of shooting plaintiff in the back at the bottom of PL6 stairway was reasonably necessary to prevent plaintiff's escape and not excessive and a feasible warning was given under all of the circumstances confronting the officer at the time then you would find that the police officer was justified in using deadly force.

ON the other hand if you find that the plaintiff had sustained his burden of proof that Police Officer Rodriguez was not reasonable in believing that the level or the extent of using deadly force was necessary to prevent plaintiff's escape from custody under the circumstances confronting the officer at the time in shooting him in the back at the bottom of PL6 and he failed to give a feasible warning then you would find that his use of deadly force was not justifiable or unjustifiable.

APPENDIX K—Colloquy After Jury Retired.

(1909) MR. KUZMACK: I further request on that same order your Honor that the court read 35.30 of the Penal Law and the paragraph the court pointed out on page 1701 of the decision *Garner vs. Tenessi* to the jury and make it clear that is the law there to be followed in the case.

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(1910) MR. BREITBART: He wants you to read the Supreme Court decision.

THE COURT: I decline to read the language I believe that my instructions on the law covered both the PL 35.30 and the Supreme Court decision.

* * *

(1919) The second request which has been marked Court Exhibit 6. Again requests instructions from Judge of yesterday. Law on use of deadly force Penal Code 35.30 of the Supreme court.

* * *

Now with respect to the re-reading of my instructions to you as to the Penal Law (1920) 35.30. Supreme Court decision that I referred to in my charge as well as the law on the use of deadly physical force that you have requested—you have requested—you also have indicated re-reading of instruction from me approximately the last thirty minutes. I will have re-read to you all of that portion of my instructions to you regarding Penal Law 35.30 and the Supreme Court decision and the use of deadly force and the law in that regard

but I am unclear as to whether you want me also to re-read to you or have it read to you my instructions as to the measure of damages which was part of the last thirty minutes.

So what I am going to do is have you go back to the juryroom and the court officer will give you what you have requested, the documents and list of exhibits and to let me know whether you want to have everything that I instructed you on beginning with the law as to use of deadly force and the Penal Code and Supreme Court decision through the end which could cover also the measure of damages or whether you just want the law.